California Acrylic Industries, Inc., d/b/a Cal Spas; G.B. Manufacturing, Inc. *and* United Electrical, Radio and Machine Workers of America (UE). Cases 21–CA–29450, 21–CA–29523, and 21–CA–29560

August 27, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On December 5, 1995, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in answer to the Respondent's exceptions, and the Respondent filed a brief in reply to the General Counsel's brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, California Acrylic Industries, Inc., d/b/a Cal Spas; G.B. Manufacturing, Inc., Pomona, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees regarding their union sympathies and activities.

(b) Threatening its employees that it will move its business operations elsewhere or declare bankruptcy in order to discourage employees from engaging in activities in support of the Union.

(c) Engaging in surveillance of its employees' union activities by videotaping those activities, including their contacts with union agents and other protected concerted acts, or by creating the impression that it is engaging in surveillance of its employees' contacts with union agents by videotaping those activities.

(d) Issuing warning notices to its employees for soliciting other employees to support the Union notwithstanding that it has no rule or regulation prohibiting employees from engaging in those activities during worktime.

(e) Failing and refusing to offer unfair labor practice strikers, who unconditionally offered to return to work and end their unfair labor practice strike, immediate reinstatement to their former or substantially equivalent positions.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer all of its employees, who had engaged in an unfair labor strike and who, on July 19, 1993, had unconditionally offered to return to work and end their strike, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired after June 18, 1993.

(b) Make all of its employees, who had engaged in an unfair labor strike and who, on July 19, 1993, had unconditionally offered to return to work and end their strike, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, remove the June 11, 1993 warning notice from Jose David Hernandez' personnel file; remove all references to the warning notice; and do not use the warning notice as the basis for personnel action against Hernandez; and within 3 days thereafter notify Hernandez in writing that this has been done, and that the warning notice will not be used against him in any way.

(e) Within 14 days after service by the Region, post at its facility in Pomona, California, copies of the at-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt pro forma the judge's dismissal of complaint allegations involving the Respondent's surveillance of employees on May 28 and June 3, 1993, and the judge's finding that Raymundo Soto forfeited his reinstatement rights because of the death threats he made on the picket line.

Also in the absence of exceptions, we adopt pro forma the judge's finding that employees Miguel Acosta and Vicente Castillo engaged in coercive conduct, and his finding that Respondent condoned this conduct. We do not pass on the merits of either issue.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We note also that the judge made inadvertent errors in the notice and we shall correct them.

tached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 16, 1993.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees regarding their activities in support of United Electrical, Radio and Machine Workers of America (UE) (the Union).

WE WILL NOT threaten our employees that we will move our business operations elsewhere or declare bankruptcy in order to discourage them from engaging in activities in support of the Union.

WE WILL NOT engage in surveillance of our employees' union activities by videotaping their activities, including their contacts with representatives of the Union, or create the impression in the minds of our employees that we are engaging in surveillance of our employees' union activities by videotaping their contacts with representatives of the Union.

WE WILL NOT discipline our employees because they have solicited other employees to support the Union during their worktime when we have no rule or regulation prohibiting such conduct.

WE WILL NOT fail and refuse to offer to our employees, who engaged in an unfair labor practice strike and who unconditionally offered to return to work and end their strike, immediate reinstatement to their former or substantially equivalent positions, discharging, if necessary, any replacement employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer immediate reinstatement to our employees, who unconditionally offered to return to work after an unfair labor practice strike and who were not offered immediate reinstatement to their former jobs, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make our employees, who unconditionally offered to return to work after an unfair labor practice strike, whole for any loss of earnings and other benefits.

WE WILL, within 14 days from the date of the Board's Order, remove the disciplinary warning notice, pertaining to his soliciting other employees to support the Union, from the personnel file of Jose David Hernandez; remove all references to it from his personnel file, and not refer to it as a basis for any future discipline of him; and WE WILL, within 3 days thereafter, notify Hernandez in writing that this has been done, and that the warning notice will not be used against Hernandez in any way.

CALIFORNIA ACRYLIC INDUSTRIES, INC., D/B/A CAL SPAS; G.B. MANUFACTURING, INC.

Salvador Sanders, Esq., for the General Counsel.
Wayne A. Hersh, Esq., Jon G. Miller, Esq., and *Terrence Mitchell Leve, Esq. (Hinchy, Witte, Wood, Anderson & Hodges)*, of Irvine, California, for the Respondent.
Humberto Camacho, International Representative, of Compton, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Original, first amended, second amended, third amended, and fourth amended unfair labor practice charges in Case 21–CA–29450 were filed by the United Electrical, Radio and Machine

Workers of America (UE) (the Union), on June 16 and 23, July 21 and 27, and October 14, 1993, respectively.[1] The unfair labor practice charge in Case 21–CA–29523 was filed by the Union on July 27, and the original and first amended unfair labor practice charges in Case 21–CA–29560 were filed by the Union on August 9 and October 1. Based upon the above filings, on June 30, 1994, the Regional Director for Region 21 of the National Labor Relations Board (the Board), issued an amended consolidated complaint, alleging that California Acrylic Industries, Inc. d/b/a Cal Spas; G.B. Manufacturing, Inc. (Respondent Cal Spas and Respondent GB), engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Thereafter, counsel for Respondent Cal Spas and Respondent GB timely filed an answer, denying the commission of any of the alleged unfair labor practices. As scheduled, the above-captioned matters came to trial before me on December 5, 1994, in Los Angeles, California, with the trial continuing on December 6–8 and 12–15, 1994, and concluding on January 12, 1995. At the trial, all parties were afforded the opportunity to examine and to cross-examine all witnesses, to offer into the record all relevant evidence, to argue their legal positions orally, and to file posthearing briefs. The documents were filed by counsel for the General Counsel and by counsel for Respondent Cal Spas and Respondent GB and have been carefully considered. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the testimonial demeanor of the several witnesses, I issue the following

FINDINGS OF FACT[2]

I. THE ISSUES

The amended consolidated complaint alleges that Respondent Cal Spas and Respondent GB engaged in conduct violative of Section 8(a)(1) of the Act by interrogating employees with regard to their union membership, sympathies and activities, by threatening employees with relocation of their business operations and bankruptcy because employees were engaging in union activities, by watching as employees interacted with agents of the Union, thereby engaging in surveillance of their employees' union activities or creating the impression of surveillance of said activities, by videotaping employees as they met with agents of the Union, thereby engaging in surveillance of their employees' union activities or creating the impression of surveillance of said activities, and by videotaping employees as they engaged in union activities, thereby engaging in surveillance of said activities or creating the impression of such surveillance. Both Respondents denied the commission of said alleged unfair labor practices. Further, the amended consolidated complaint alleges that the Respondents engaged in conduct violative of Section 8(a)(1) and (3) of the Act by issuing a warning notice to employee Jose David Hernandez because he engaged in activities in support of the Union. Counsel for the Respondents concede that Hernandez was issued a warning notice but contend that such related to the employee's violation of the Respondents' work rules and not to his activities in support of the Union. Finally, there is no dispute that, commencing on June 18, the employees of Respondent Cal Spas and of Respondent GB engaged in a concerted work stoppage and strike; that, on July 19, each of the striking employees unconditionally offered to end his or her strike and return to work; and that, rather than offering each immediate reinstatement to his or her former position, Respondent Cal Spas and Respondent GB placed the former strikers on preferential hiring lists and offered reinstatement when positions became available. In the amended consolidated complaint, the General Counsel contends that, from its inception, the concerted work stoppage was, at least, in part, an unfair labor strike based on the Respondents' alleged surveillance of employees' contacts and meetings with agents of the Union, that, therefore, each of the former strikers was entitled to immediate reinstatement upon unconditionally offering to return to work, and that, by failing to immediately reinstate the former striking employees, the Respondents engaged in conduct violative of Section 8(a)(1) and (3) of the Act. In denying the commission of the alleged unfair labor practices, counsel for Respondent Cal Spas and Respondent GB contend that, rather than being motivated by alleged unfair labor practices, the employees' work stoppage was motivated solely by economic considerations and that, therefore, the Respondents' recall procedures were entirely lawful. Counsel for the Respondents further contend that, even if the strike was motivated, in part, by alleged unfair labor practices, the companies should not be required to reinstate employees, who engaged in misconduct while striking or who, despite their unconditional offer to return to work, continued to engage in their work stoppage.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

California Acrylic Industries, Inc. (CAI), is a California corporation, which performs its business operations under the name, Cal Spas, and which is engaged in the manufacture and sale[3] of spas, gazebos, saunas, and pool tables, and G.B. Manufacturing, Inc., a California corporation, is a wholly owned subsidiary of CAI and is engaged in the manufacture and assembly of products for sale by Cal Spas. Based on the answer to the amended consolidated complaint and the parties' stipulations during the trial, the record establishes that Respondent Cal Spas and Respondent GB share a common manufacturing and office facility, comprised of adjacent buildings located on both sides of Ninth Street, in Pomona, California;[4] that Respondent Cal Spas and Respondent GB

[1] Unless otherwise stated, all events herein occurred during 1993.

[2] With regard to the Board's jurisdiction herein, the answer to the amended consolidated complaint admits that Respondent Cal Spas and Respondent GB are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Further, at the hearing, the parties stipulated that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] In this regard, Respondent Cal Spas operates 46 retail establishments, with 38 stores located in California, 3 in Arizona, and others in Washington, Pennsylvania, Georgia, Indiana, and Kentucky.

[4] Respondent Cal Spas manufactures the wood framing for its spas and other products in what is known as the woodchuck building, and Respondent performs all the remaining production functions in the facility's other buildings, some of which are situated next to the woodchuck building and across the street, behind the common office building. The street numbers for the buildings are 1441 E. Ninth Street (which houses the vacuum form and acrylic warehouse, the warehouse, the global control department, and the parts, service, re-

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are affiliated business enterprises with common ownership, officers, directors, management, and ultimate supervision; that Respondent Cal Spas and Respondent GB administer and share common labor relations and safety policies; that each provides services for and make sales to the other; and that Respondent Cal Spas and Respondent GB hold themselves out to the public as a single-integrated business enterprise, doing business under the name, Cal Spas.[5] The record further establishes that Chuck Hewitt is the president of California Acrylic Industries, Inc.; that Larry Kinsella is the general counsel of CAI and in charge of production for Respondent; that Maria Martinez is the chief financial officer of CAI and is in overall charge of bookkeeping for Respondent; and that Robert Suminski is the vice president of special projects for CAI and, as such, is responsible for Respondent's real property, including security for such. Finally, in or about June 1993, Respondent employed between 700 and 800 production and maintenance workers at its Pomona, California facility.

The record reveals that the Union's organizing campaign amongst the production and maintenance employees at Respondent's Pomona facility commenced in early March; that, for the most part, organizing was conducted openly on the public sidewalks in front of the production buildings and the entrance to the employees' parking lot;[6] and that there is no dispute that Respondent's management was aware of the presence of representatives of the Union outside its plant buildings. In this regard, during March, April, May, and June, agents of the Union, including Humberto Camacho, who, as an International representative for the Union, supervises the Union's local unions in the western United States, and organizers David Bacon, Miguel Canales, and Maria Pantoja, who wore buttons identifying themselves as agents of the Union, regularly distributed handbills[7] to Respondent's employees and spoke to them individually and in groups during the employees' lunch period, which lasted from 10:30 a.m. in the morning until noontime.[8] In addition, several employees volunteered to participate on an employee organizing committee; they were responsible for soliciting their fellow employees to support the Union, distributing authorization cards, and informing employees regarding organizing meetings and other union-related business. The organizing campaign culminated on May 28 when the Union filed a petition for a representation election with Region 21 of the Board, and it is alleged that Respondent commenced the commission of unfair labor practices at approximately the same time. Thus, Juana Flores, who was employed in the global controls department, in which Raymundo Olguin was the supervisor, and whose brother, Cirilo, was an active supporter of the Union, testified that, on, she believed, May 22,[9] "I was in my area and Raymundo Olguin was at a table where he was working and he called me to his table. He [asked] if I knew what the risks were, what would happen if the Union would come in. . . . He told me that the company could be moved to another place or they would declare bankruptcy. He told me we could end up . . . without work and without Union." Then, according to Flores, Olguin "asked me if I had signed a Union card already" and if her brother Cirilo had given one to her. Flores answered "no" each time. Olguin, whom, Respondent admitted, is a supervisor within the meaning of the Act, conceded that he became aware of the Union's organizing drive when "people started to hand out papers to my employees . . . on the sidewalk," generally denied ever speaking to Flores about the Union, and failed to specifically deny the alleged conversation.

Humberto Camacho testified that, in conjunction with the Union's filing of the petition for a representation election, on May 28, he addressed a crowd of approximately 200 bargaining unit employees during their lunch period outside of Respondent's Pomona facility and that the meeting occasioned conduct constituting what is alleged as unlawful surveillance by Respondent. In this regard, Camacho further testified that this was the first mass meeting of bargaining unit employees,

tail, and installation departments), 1443 E. Ninth (the woodshop), and 1462 E. Ninth (the office building and the fiberglass and tile, plumbing, equipment installation, water test, foam, shipping and receiving, and other departments). Also, an employee parking area is located on the east side of the woodchuck building; a large grass area is located in front of the woodchuck building, between it and the public sidewalk; and a parking lot is located in front of the office building.

California Acrylic Industries, Inc. also operates a manufacturing facility in Ontario, California, at which pool tables are manufactured.

[5] In these circumstances, notwithstanding that Respondent Cal Spas and Respondent GB maintain separate employee complements, it is clear that they comprise a single employer for purposes of these matters. Thus, in determining whether two or more nominally separate enterprises constitute a single entity, the Board considers four principal factors: common management, centralized control of labor relations, interrelations of operations, and common ownership. *Good Life Beverage Co.*, 312 NLRB 1060, 1072 (1993); *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136, 1138 (1990). However, the Board neither deems any one factor as controlling nor mandates that all of said factors be present, for "single employer status depends on all of the circumstances of the arms length relationship found among unintegrated companies." *Blumenfeld Theaters Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980). Put another way, "the fundamental inquiry is whether there exists overall control of critical matters at the policy level." *Good Life Beverage Co.*, supra. Herein, it appears that each of the four elements of single employer status is present. Thus, Respondent Cal Spas and Respondent GB have common management; there is a common labor relations policy for both entities; the operations of both Respondents are interrelated; and there is common ownership of both corporations. Accordingly, for purposes of these proceedings, I find that Respondent Cal Spas and Respondent GB constitute a single employer (Respondent).

[6] Apparently, the organizing was also conducted at the Ontario, California plant; however, the evidence, adduced at the trial, exclusively concerned the Pomona facility.

[7] The handbills, which were distributed during the initial organizing period, concentrated on typical worker concerns. Thus, R. Exh. 12, distributed in early May, reminded Respondent's employees that they were in a struggle for "justice and dignity" and called for "fair" wages, medical insurance, paid holidays and vacations, and recognition of seniority.

[8] Respondent's employees in each department were given a half hour lunchbreak, and these were staggered over a 90-minute period. Most of the employees purchased their lunches from catering trucks, which were parked on Ninth Street in front of the plant buildings, and ate their food while sitting on the grass area in front of the woodchuck building. There is no record evidence that any Union official trespassed onto the grass area; rather, the record establishes that the union agents either addressed employees, who were seated on the grass, from the sidewalk or sought to converse with them on the sidewalks on either side of the street.

[9] Apparently, May 22, 1993, was a Saturday, and global control employees did not work that day.

which the Union conducted outside of the plant; that he spoke to the employees, who were seated or standing on the grass area in front of the woodchuck building, from the public sidewalk; that he spoke in Spanish and English, informing the employees of the filing of the election petition, of their rights under the Act, and of a union meeting scheduled to be held at a local church the next evening; that, while he addressed the employees, Robert Suminski and another individual walked out of the woodshop building "and they stood on the sidewalk by the place where I was talking to the employees and they stayed there . . . until I finished;" and that this was the first incident of perceived surveillance about which Camacho was aware. According to Camacho, when he finished speaking to the employees, he walked over to where Suminski was standing, identified himself as an official of the Union, said that he didn't want to have any problems with Respondent's supervision, and shook Suminski's hand, and the latter responded that, as long as the Union stayed off company property, there would be no problems.[10] General Counsel's Exhibit 2 is a photograph, which was taken by David Bacon and in which Camacho is seen addressing Respondent's employees, who are seated on the grass area in front of the woodchuck building, from the public sidewalk and two individuals, one of whom is wearing slacks and a polo shirt and is standing with his feet apart and his hands in his pockets, are approximately 15 feet to the left of Camacho and observing what was taking place. Both Camacho and Bacon testified that the photograph was taken on May 28; that it depicts the former's lunchtime meeting with Respondent's employees; and that the individual, standing with his hands in his pockets and observing Camacho, was Suminski. Testifying during cross-examination, the latter identified himself in the photograph, conceded that the scene depicts him observing a Union meeting in front of the woodchuck building, and averred that he "probably" was on his way to the woodchuck building and observed Camacho speaking to the assembled employees for no longer than 30 seconds.[11]

It is alleged that Respondent's unlawful surveillance of the Union's organizers' meetings with employees outside the Pomona facility intensified in early June when security guards[12] began carrying video cameras and seemingly videotaping the contacts between the Union's agents and Respondent's employees. According to organizer, Miguel Canales, he initially noticed that the security guards were carrying video cameras during the morning of June 3 and immediately left the plant to inform Camacho, by telephone, at the Union's office in Compton, California. Canales added that he telephoned Camacho at approximately 12 noon from the organizing campaign command center, located in the garage of an individual, Alfredo Carabez, who had been recently terminated by Respondent. Camacho testified that he received Canales' message, regarding Respondent's security guards taking pictures of the Union's agents' contacts with employees, late in the morning and drove to Carabez' garage, and Canales informed him of what he had seen. Then, at approximately 2 p.m., Camacho, Carabez, and Canales drove to Respondent's Pomona plant and, as they climbed out of their car, a guard immediately walked towards the three men and pointed his video camera as if taking pictures. Camacho told the guard that he had no right to be videotaping their activities.[13] According to Camacho, he became angered by the likelihood that Respondent was about to commence videotaping the union organizers' meetings with employees outside the plant and asked Carabez to inform Respondent's employees that he (Camacho) wanted to meet with them the next morning during their lunchtime.

Camacho further testified that, on June 4, accompanied by organizers Bacon and Canales, he arrived in front of Respondent's Pomona facility at approximately 11 a.m., and, as employees exited from the plant buildings, the union agents asked them to assemble on the grass in front of the woodchuck building as Camacho desired to speak to them. According to Camacho, in excess of 200 employees gathered on the grass, and, as he was about to begin speaking to them from the public sidewalk, someone alerted him that he was being watched. Camacho turned and observed that "there was a [uniformed man] . . . with a video camera and . . . there was another guard with a video camera by the [entrance and exit gate to the woodchuck building]." Camacho instructed Bacon to take photographs of the guards with the video cameras and proceeded to tell the massed employees

[10] During cross-examination, Camacho conceded that he never sought Respondent's permission for this meeting but stated that the employees were massed on the grass area as "that was the usual place where they sit every day."

[11] Suminski explained that he just happened to come upon the meeting and that "when you have to cross the street and they're right there in front of you, sure. You're going to come upon the meeting." He added that it appears to have been the day when he and Camacho shook hands.

[12] There is no dispute that, in 1991, Respondent contracted with AFI Security, Inc. (AFI) to provide security guards at Respondent's Pomona plant, and there is also no dispute that the number of guards, which AFI provided, increased during the first week of June. Thus, prior to June, there had been four guards on duty at all times during the day with their posts being the entrance to the employee parking lot, the entrance to the office building, the entrance to the plant's shipping and receiving entrance, and the entrance to the woodchuck building. However, according to Suminski, in early June, because of vandalism, consisting of deflated tires and stolen radios, to Respondent's trucks, which were parked in a parking area behind the woodchuck building, a new guard was assigned to that area of the plant. Also, another new guard was stationed on the grass area in front of the woodchuck building. Robert Murillo, the director of operations for AFI and the individual who supervised the AFI security guards at Respondent's Pomona plant, contradicted Suminski as to the type of vandalism to Respondent's trucks, which, according to him, consisted of "a couple" of trucks being "spray painted with graffiti." Also, Larry Kinsella, who ultimately approved the increase in the number of security guards, contradicted Suminski on the rationale for doing so. Thus, answering a question posed by the undersigned, the general counsel admitted that the security-guard complement was increased "if in the eventuality there was any unprotected activity, we would be able to have a record of it."

[13] While Canales' and Camacho's respective accounts of what occurred on June 3 was uncontroverted, counsel for Respondent attached to their posthearing brief what appear to be the telephone usage records for the telephone number of the telephone in Carabez' garage. Respondent requested the documents by subpoena prior to the close of the hearing, and counsel for the General Counsel transmitted them to counsel for Respondent subsequent to the close of the hearing. Counsel requested, and I take official notice of the records, which show that the only telephone calls to the Union's Compton, California office on June 3, 1993, from the Carabez' garage telephone were placed at 9:54 a.m. and 2:09 p.m.

that the surveillance by the security guards was unlawful but that the Union would not file unfair labor practice charges because such would result in postponement of the election. Contradicting Camacho as to contacts with Respondent's employees during the morning of June 4, Canales testified that he, Camacho, and Bacon stood on the north and south sidewalks along Ninth Street; that, as employees left the plant buildings for lunch, they approached the union agents, asking about the election petition; that Camacho would explain "that the company was using intimidating tactics by bringing people to videotape when we were talking;" and that these conversations with groups of employees would last 15 to 20 minutes while the workers ate their lunches. Canales also contradicted Camacho as to the alleged surveillance, testifying that he observed no fewer than four guards using video cameras that morning—"Each one of the guards had a camera but not all of them were taping at the same time. Depending on where we were talking to the people, they would be doing the taping." Both Camacho and David Bacon testified that, pursuant to the former's instructions, Bacon did, in fact, take photographs that morning of the security guards holding and apparently operating video cameras, and each identified five of the June 4 photographs. Thus, General Counsel's Exhibit 3 depicts a uniformed security guard, holding a video camera while sitting in a chair on the grass area in front of the woodchuck building;[14] General Counsel's Exhibit 4 depicts a security guard pointing his camera directly at the photographer and videotaping;[15] General Counsel's Exhibit 5 depicts a security guard, who is seated in a chair on the grass, pointing his camera at and apparently videotaping the activities of employees, some of whom are standing and some of whom are sitting, directly in front of him on the grass;[16] General Counsel's Exhibit 6 depicts Camacho meeting with a group of employees on the sidewalk in front of Respondent's office building;[17] and General Counsel's Exhibit 7 depicts a man, wearing a shirt and tie, standing in the parking lot in front of Respondent's offices and apparently operating a video camera.[18] Finally, there is no evidence that the alleged videotape surveillance of their contacts with representatives of the Union outside the plant angered any of the bargaining unit employees enough to have provoked some to demand an immediate strike against Respondent. This must be contrasted with what occurred after Alfredo Carabez was attacked and beaten outside the plant on or about June 10. Organizer Maria Pantoja testified that employees, who witnessed the incidents, were extremely upset at what had occurred and, at a meeting with them, she was forced to counsel them against striking over the incident.

There is no dispute that Respondent obtained video cameras in order to record events in front of the Pomona plant. In this regard, Joint Exhibit 6(a) establishes that, on behalf of Respondent, AFI rented three camcorders and purchased six videotapes; Richard Lucien, the sales manager for AFI in 1993, testified that he was the individual, who obtained the three video cameras; and Robert Suminski conceded that "we rented the cameras on the 3rd" of June. As to why Respondent believed it was necessary to procure video cameras, Suminski testified that obtaining video cameras was suggested by Larry Kinsella, Respondent's general counsel, and that such was precipitated by "the outdoor meetings," which were "very loud and boisterous and one didn't know what they were going to do . . . . it almost could be a mob situation if it weren't controlled properly."[19] Kinsella, however, contradicted Suminski on this point, testifying that the cameras were purchased based upon "reports of harassment by individuals who were pro-union who were attempting to foster more people to their side. This was escalating and we wanted to make absolutely certain that we had a record of violence." Kinsella added that Respondent had reports of such violence from management officials, including Suminski, Maria Martinez, and Peggy Jiles, the assistant personnel manager in 1993. However, while each individual testified on behalf of Respondent, neither corroborated Kinsella's testimony on this point.

Concerning the intended use for the video cameras, the record evidence establishes that Respondent held a meeting to discuss that subject. Thus, Suminski testified on direct examination that the meeting occurred "at the time [the cameras] were going to be rented" but, during cross-examination, conceded that it "had to have been the day we got the cameras"—June 3.[20] According to Suminski, those present at the meeting were Kinsella, Robert Murillo, and himself, and Kinsella gave explicit instructions for the use of the video cameras—"the video cameras were to be used only if the strikers were blocking the entrances, if there was violence or threats of violence and we could not videotape just to videotape." However, after I pointed out that there was no strike at the time of the asserted meeting, Suminski changed his testimony, regarding the nature of the instructions as to the type of conduct to record, to "violent activities. . . . We were concerned about violence and property damage." Kinsella also recalled the meeting and, evidently

[14] Albert Saldana, an AFI security guard identified himself as the security guard in the photograph.

David Bacon testified that, when he took the photograph, meetings between employees and the Union's agents were taking place on the public sidewalk in front of the guard.

[15] Robert Murillo identified himself as the security guard in the photograph.

Bacon testified that Murillo was facing the sidewalk where workers and the union organizers were standing. He added that, while the video camera appears to be pointed directly at him, "behind me were the workers who were on their lunchbreak and union organizers who were talking to each other. I believe he was filming them."

[16] Saldana identified himself as the security guard in the photograph.

Bacon testified that Camacho was speaking to the employees, who are shown in front of the security guard; however, Camacho can not be seen in the photograph.

[17] Bacon testified that the meeting, which is depicted in the photograph, lasted between 5 and 10 minutes, and was "one of a number of meetings conducted that day."

[18] Bacon testified that the individual, depicted in the photograph, had just come outside from Respondent's offices when he began using the video camera and that he was apparently videotaping "conversations taking place between workers and Union organizers." Bacon added that he was on the sidewalk when he took the photograph.

[19] Apparently, what Respondent was concerned about was the noise resulting from the meetings on the grass area in front of the woodchuck building. Thus, questioned as to what he considered a "mob," Suminski opined, "Enough to make a rather loud noise."

[20] Richard Lucien testified that, notwithstanding having rented the video equipment, he did not visit Respondent's Pomona plant until June 7. However, the record does establish that Robert Murillo was there every day.

bolstering Respondent's position that the cameras were not utilized until the start of the strike, testified that "I advised [AFI] about the video cameras and the guards were to use them in the event of violence and blocking of driveways and deliveries." Contradicting Suminski but apparently corroborating Kinsella, AFI's Murillo testified that Respondent did not give AFI permission to videotape until June 18 and that, at a meeting with Kinsella, he was given instructions that "the only thing we were to videotape was anything out of the ordinary," pertaining to the strike.

Respondent denies that the AFI security guards engaged in any videotaping of union organizing activities, which may have been conducted outside the Pomona plant, prior to June 18—the day the strike commenced. Thus, Robert Murillo stated that he had no knowledge of any videotape recordings made prior to that date and that he was the only AFI employee who made authorized videotape recordings of events on and after June 18. Also, as to his alleged conduct on June 4, Albert Saldana, an AFI security guard, testified that he was not assigned to work at Respondent's Pomona plant until after the start of the strike and that he observed "picketing and signs" upon his arrival at the plant. After identifying himself in General Counsel's Exhibits 3 and 5 as the individual holding the video camera, Saldana continued to maintain that picketing was ongoing at the time of the photographs. Moreover, while stating that Robert Murillo's instructions to him were to photograph only violence on the property, Saldana testified, during cross-examination, that, while he was carrying a video camera at the time of the photographs and did so "most of the time" that day, he did not take any pictures—"I never used that kind of camera before. I kind of looking around to see if I could focus in case I had to use it. They had just handed it to me. . . . I was just feeling the camera out." However, contrary to Saldana, Suminski admitted that General Counsel's Exhibits 3 and 5, the Saldana photographs, were taken in "the early June days," and Murillo conceded that neither was taken at the time of the strike.

There is no dispute that alleged discriminatee, Jose David Hernandez, an employee in Respondent's warehouse, was given a disciplinary warning notice, dated June 11, by Respondent and that the warning notice (G.C. Exh. 14) reads:

> You have been observed reading and discussing union literature and activities which appeared to be solicitations on behalf of the Union during periods in which you are being paid to work. This type of activity is not be engaged in during times in which you are being paid to work. Further activity of this type will subject you to disciplinary action including termination.

With regard to the warning, Hernandez, who testified that, a week prior to the incident precipitating the warning, he had been denied entry to an global controls department employees meeting by his supervisor, Alberto Olivo, "because you're not with the company," further testified that, on the day at issue, he discovered a Union organizing leaflet on a shelf in the warehouse, showed it to a coworker, Lorena Orozco, and asked if she needed any more information about the Union. Orozco became upset and said that, if she wanted information about the Union, she would go outside and speak to the union agents. Thereupon, she walked away, and, according to Hernandez, "I could see she was really mad when she left." No more than 10 or 15 minutes later, Hernandez continued, "Olivo came back and he was mad and he [asked] what did you say to Lorena and I told him nothing. And then I just turned around and asked [another employee] what did I say to Lorena and he goes nothing." Olivo responded, "[Y]ou told her something. . . . he [said] don't talk about the Union," and he walked away. Approximately a half hour later, Olivo returned to Hernandez' work area and said he was taking the latter to the personnel office. They then walked across Ninth Street, entered the personnel office, and spoke to Peggy Jiles. Hernandez testified that she had a copy of the above-quoted warning notice and handed it to him. Hernandez read it and "told her that warning was ridiculous and I'm not going to sign it." Jiles said nothing, but "Olivo said that he got witnesses that said I was handling [sic] literature to people in the warehouse . . . and talking to people about the Union, too." During cross-examination, Hernandez admitted that, after refusing to sign the warning notice, in front of Jiles, he confronted Olivo and warned him that "he was driving me to the point that . . . I don't want to take it any more and I might . . . want to hit him."

Respondent's version of the incident, which precipitated the warning notice significantly differs from that of Hernandez. Thus, Lorena Orozco denied ever speaking to Hernandez about the Union during working hours inside the warehouse, and Alberto Olivo testified that, at the time of the incident, he observed Hernandez "two isles over from where he should be" at the work station of employee Leonardo Espinoza and that, as he walked closer to them, he also observed that Hernandez was reading from a paper to Espinoza, who, according to Olivo, does not know how to read, and that the paper "was about the Union."[21] Olivo further testified that he decided to discipline Hernandez "because he was handing literature to another employee about things that had nothing to do with work and he was doing it during working hours." Olivo added that both men were supposed to be working at the time but that he did not give a warning notice to Espinoza because "it was his first time. He was in his work area. I found him assembling while he was listening" and "I didn't think it would affect him because he was doing his work." The parties stipulated that, in June 1993, Respondent did not have, in force or in effect, any form of a no-solicitation, no-distribution rule, and when asked if Respondent had a rule prohibiting Hernandez' conduct, Olivo averred that he was not sure if it was a written rule[22] but that the warning was given "because they are paid to work not to be going around giving literature if something has nothing to do with work."[23]

[21] Olivo knows this because he assertedly took the flyer from Hernandez.

[22] At first, Olivo maintained that Hernandez did violate a published rule and pointed to rule 17 of Respondent's Standards of Conduct, which concerns an employee's failure to observe the working schedule, including rest and lunch periods.

[23] During rebuttal, Hernandez specifically denied Olivo's version of the events. While conceding that he had been previously instructed by Olivo to stay in his assigned work location, Hernandez denied speaking to Espinoza when he found the union leaflet and stated that, while he was speaking to a friend named Gustavo,

Continued

Once again, during cross-examination, asked what Hernandez did that was wrong, Olivo changed the basis for the warning, saying that "I assigned him to do something and he didn't do it because of doing something else" and adding that he was speaking to Espinoza without permission. Contrary to this explanation for the warning notice, Peggy Jiles, the assistant personnel manager, testified that Olivo described the incident, which formed the basis for the warning notice, as follows: "That during the working hours Hernandez was talking with another employee and that he had also with him literature and talking about what was in the literature. He was holding a piece of paper . . . something that was not work related." She added that she explained the basis for the warning to Hernandez and that she told him that he "had been observed reading and discussing the union literature and activities which appeared to be solicitation on behalf of the Union during periods in which he was being paid to work."[24]

Another instance of unlawful interrogation is alleged to have occurred at approximately the same time as the Hernandez warning notice. Thus, employee Encarnacion Garcia, who worked in the global controls department, testified that, approximately a week before the employees commenced their strike, he had a conversation with his supervisor, Raymundo Olguin, in a corner of his department. According to Garcia, Olguin had been calling employees, in sequence, to his desk and called to him when he was next in order. Garcia approached Olguin's table, and Olguin "asked me if I had signed any paper for the Union because he knew that Cirilo was handing out sheets of paper to sign. . . . I told him that I had not signed it yet. But I was thinking of doing it. . . . he told me to think about it." Again, Olguin generally denied questioning Garcia about the Union but did not specifically deny the occurrence of the incident.

The record establishes that Humberto Camacho decided against filing unfair labor practice charges over Respondent's allegedly unlawful surveillance of the Union's contacts with employees outside the plant and the Union's organizer, Maria Pantoja, felt obliged to dissuade angry employees from engaging in a strike over the alleged assault on Alfredo Carabez as the Union desired to do nothing to block the representation election proceeding before the Board. However, such was to no avail as Respondent itself filed an unfair labor practice charge against the Union, alleging that the latter had committed acts of violence against individuals in early June, and, on June 14, the Acting Regional Director for Region 21 issued an order, indefinitely postponing the representation election petition hearing, which had been scheduled for June 17, proceeding pending investigation of Respondent's unfair labor practice allegations. Camacho and the Union's organizers, 2 days later, met with five or six members of Respondent's employees' volunteer organizing committee in Carabez' garage, and, for the first time, the union officials recommended a concerted work stoppage by Respondent's employees. According to Camacho, who denied becoming aware that processing of the Union's representation petition had been blocked by the investigation of an unfair labor practice charge, filed by Respondent, until, at least, a month after the date of the acting Regional Director's order, the meeting lasted from 6:30 until 10 p.m. and a strike was discussed. "I explained to the committee that it was time when no longer we can take care of the security of our own people. The surveilling was so blatantly in the plant. . . . And that in order to protect ourselves, the only way that I knew was to go out on strike and . . . I wanted them to consider my recommendation of striking the company."[25] He added that the committee members agreed to confer with the voting unit employees and meet again the next night.

Maria Pantoja, who admitted becoming aware of the blocking of the election proceeding "a couple of days before" June 18, testified that, for the first time, the possibility of a strike against Respondent was discussed—"we were joking about what was happening and all the violations [of the Act] and how [these] had made it very difficult to the committee members to keep organizing and how the workers were now really afraid of being . . . disciplined." Then, according to Pantoja, striking was raised, and a discussion ensued regarding the reactions of employees in Respondent's various departments. Ultimately, she added, a decision was reached "that the committee members were going to go back to their departments and get the word around . . . on the possibility of striking the company." David Bacon recalled that Camacho told the volunteer organizing committee employees "to consider striking because of unfair labor practices that were taking place. . . . There was a long list," including surveillance, threats to employees, warnings, and a discharge. With regard to surveillance, according to Bacon, Camacho mentioned "the fact that there were men outside of the plant listening to them and taking note being videotaped out there." After listing what he termed as unfair labor practices, Camacho "recommended to the Union committee that we get the agreement of the workers to strike the company. . . . What we agreed on at the meeting was that we would hold a larger meeting the following day to involve more people in the discussion in the process of making a decision . . . and if they were in agreement . . . we would talk to the workers in general" at a previously scheduled rally at the plant on Friday, June 18.[26] Finally, with regard to what was discussed, contradicting Camacho, who denied that any-

Lorena passed by and "I just [asked] her . . . if she needed more information, I just showed her the paper and that was it."

[24] Jiles and Hernandez gave conflicting testimony over another warning notice, which was given to the employee 2 days before the allegedly unlawful warning notice. Specifically, each gave divergent testimony over whether Hernandez was aware that a date (January 11), which appears in the body of the warning, was crossed out and changed to April 1 and whether a second page, an employee absence calendar, had been attached to the warning notice. G.C. Exh. 15 is the copy of the warning notice, which, Hernandez says, was given to him, and not only is the January 11 not crossed out but also there is no attachment. In contrast, R. Exh. 11(a) is the warning notice, as it was found in Hernandez' personnel file, with the January 11 crossed out and April 1 written beneath it, and R. Exh. 11(b) is the attached absence calendar. Hernandez emphatically denied seeing any version of the warning notice other than G.C. Exh. 15, and Jiles testified that the latter document represented the original copy of the warning and that Hernandez may not have asked for the corrected version, about which he was aware.

[25] Camacho stated that the impetus for a strike came from him and not from the employees.

[26] Pantoja testified that the Union had previously scheduled what it termed a "solidarity meeting" in front of the plant during the lunch period on June 18. At the rally, several visiting officials from other unions were invited to speak to Respondent's employees about the benefits of union representation and membership.

thing was said about the blocking of the election at this meeting, during cross-examination, Bacon conceded that the subject was discussed during the meeting.

As had been arranged, another meeting between union organizers and Respondent's employees was held in Carabez' garage the following evening, June 17. Camacho did not attend, but Bob Kingsley, the Union's director of organizing was present. According to Pantoja, many more employees attended than had been present the night before, and the meeting began with each telling Kingsley the department in which he or she worked and the extent of support for the Union in his or her department. Several mentioned that they were already considering a strike. Kingsley asked the committee members about planning for a work stoppage, and employee Vicente Castillo "told [him] that they had already been asking around their departments how the other workers felt about striking the company and they thought they had support because the workers were very upset at all the violations . . . going on inside the plant," including security guards videotaping the employees talking to union representatives. Pantoja further recalled that Kingsley replied that the Union would support whatever decision was taken by the employees, "and I do remember that there was moment so what are they going to do. . . . The committee members . . . said . . . we're going to ask for a strike at . . . the rally" tomorrow morning.[27]

The crux of the instant matters concerns the nature of the concerted work stoppage, in which Respondent's engaged from June 18 through, at least, July 19—whether such, at least, in part, was an unfair labor practice strike from its inception, as alleged by the General Counsel, or a strike for recognition or economic concerns, as asserted by Respondent. In these regards, there is no dispute that a union-organized rally was held on Ninth Street outside Respondent's Pomona plant buildings between 10:30 a.m. and noon on June 18; that, hundreds of Respondent's employees, who either sat or stood in the grass area in front of the woodchuck building, attended; that several individuals, including Camacho and members of the volunteer organizing committee, addressed the employees from the back of a flatbed truck, which had been rented by the Union for the occasion and parked in front of Respondent's facility; and that, immediately after the speeches and, presumably, as a result of what was said, approximately 200 of the assembled employees indicated their approval of and immediately commenced a concerted work stoppage against Respondent. What is in dispute, of course, concerns exactly what was said to Respondent's assembled employees to precipitate their vote to engage in the strike, and, in this regard, there is much seemingly conflicting testimony. Thus, Camacho testified that, having been informed of the result of the meeting the night before, he had instructed the Union's organizers that he would need a list of the issues, which the employees' committee believed should be discussed, and that, in the event of a vote to strike, the work stoppage would have to be organized "right away" with picket signs available for the employees. He testified further that he arrived at the plant site at approximately 11 a.m. and observed that the Union's organizers were already there as were representatives of other unions. Respondent's employees began coming out of the various buildings for lunch and gathering in the grass area, and Camacho began the rally by introducing the visiting union officials and the employee members of the volunteer organizing committee. After Bob Kingsley and the organizing committee members addressed the crowd, according to Camacho, he began speaking, reading from "a list of things that was prepared for me by [David Bacon]." Camacho testified that he read "everything," which was printed on General Counsel's Exhibit 8,[28] in English and then translated it

[27] One employee, Vicente Medina, a member of the volunteer organizing committee testified with regard to these two prestrike meetings in Carabez' garage. He recalled one, at which Camacho was present, during which "there was talk about us being watched too much. And video cameras. . . . When Mr. Camacho was talking . . . they would take the pictures. Also they were videotaping." As to the meeting the evening before the strike, "the members of the committee were talking about . . . that we were not able to bear the surveillance any more. They were following us with cameras." Medina continued, saying that, at this meeting, the organizing committee employees were informed that the election had been blocked by Respondent, and "[the employees on the organizing committee] said that we were not going to be able to have the election because they nave [sic] blocked it. . . . that's when we decided to go to strike." During cross-examination, Medina reiterated that the decision to commence a strike was based on two factors; Respondent had "blocked the election and they were surveilling us too by videotaping employee meetings with Union representatives."

Finally, Medina conceded that he did not mention videotaping in his pretrial affidavit but did use the term "illegal practices," which, the witness stated, included videotaping.

[28] G.C. Exh. 8, which Bacon testified he prepared for Camacho, is a one-page typewritten document, which is headed by the words, "We, the workers of Cal Spas, are outraged by the violations of our rights as workers, and of the National Labor Relations Act by our employer," and followed by nine paragraphs. It reads as follows:

> We, the workers of Cal Spas, are outraged by the violations of our rights as workers, and of the National Labor Relations Act, by our employer.
>
> The company videotaped and surveilled our discussions with union representatives, in violation of Section 8(a)(1) of the Act.
>
> The company promised and gave raises to workers to discourage their union activity, in violation of Section 8(a)(1) and (3) of the Act.
>
> The company threatened to change our working conditions and start a new shift, eliminating the overtime work we depend on to live, in violation of Section 8(a)(1) and (3) of the Act.
>
> The company changed the work hours of workers in Water Test because they supported the union, in violation of Section 8(a)(1) and (3) of the Act. The company set up a company-dominated organization, and collected signatures on company time on letters to the Personnel Director . . . asking her to bargain with the company owner over . . . wages and working conditions, to stop our union activity, in violation of Sections 8(a)(1), (2), and (3) of the Act.
>
> The company excluded employees from meeting of their departments because they are union supporters in violation of Section 8(a)(1) and (3) of the Act.
>
> On June 10 and 11 the company harassed and fired Cirilo Flores, because he testified in court on a discrimination complaint against the company, and took no action against another worker who provoked a fight with him in the plant, in violation of Sections 8(a)(1) and (3) of the Act.
>
> On June 11, the company encouraged a supplier and agent to beat up Alfredo Carabez, a union supporter and volunteer organizer, in front of the plant, in violation of Sections 8(a)(1) and (3) of the Act.

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into Spanish for the assembled employees, and "then I asked for a vote of the workers there in order to . . . declare a strike." Then, "the people took a vote and they shouted strike in Spanish and they went . . . to get picket signs."[29] Regarding what he said to the assembled employees, during direct examination in the General Counsel's case-in-chief, Camacho initially testified that all he did was to read General Counsel's Exhibit 8 verbatim to the employees but later conceded that he did mention other things, including that the Union could no longer "guarantee" the security of the employees while organizing continued and that a strike was the only means to protect the rights of the employees. During redirect, he specifically denied mentioning the employees' lack of paid vacations, paid holidays, or health insurance, or their wage rates but conceded that "maybe some people on the committee might have." Then, a month later, while testifying as a rebuttal witness for the General Counsel, Camacho conceded that he did mention that Respondent refused to recognize the Union and that Respondent's employees' strike was an unfair labor practice strike and not one seeking recognition or an economic strike. Finally, during his rebuttal testimony, notwithstanding his earlier professed lack of knowledge of Respondent's blocking unfair labor practice charge at the time of the strike rally on June 18, Camacho conceded that he did tell the assembled employees that Respondent did not want to proceed with a representation case hearing and that "they blocked the election."

David Bacon testified that, as the employees' lunch period commenced, "a couple hundred people were assembled around the flatbed truck;" that Camacho and the organizing committee employees climbed onto the back; and that Camacho, who used an electronic bullhorn to amplify his voice, "made the recommendation to the workers that they strike and listed abuses for posing a strike . . . . One of the committee members also spoke. At the end of the speeches, the workers took a vote." Those, who voted to engage in a strike, commenced picketing immediately thereafter. According to Bacon, during his speech, which was entirely in Spanish, Camacho was holding General Counsel's Exhibit 8, and "he was reading from it point by point the specific reasons for recommending that we strike," including the surveillance and other perceived, but not alleged, unfair labor practices. Maria Pantoja recalled that the rally began at approximately 11 a.m., with Camacho, who was using a megaphone device to amplify his voice, inviting the attending union officials and the employee organizing committee to address the assembled employees. One organizing committee member, Vicente Castillo, asked the employees to raise their hands if they wanted a strike. Then, Camacho spoke, reading and translating from a list, which was "the list of the violations for when they were going to take a strike vote."[30] According to Pantoja, "he mentioned the surveillance" and other perceived violations of the employees' rights, and, as he continued, "all the workers . . . were yelling strike, strike, strike . . . in Spanish." When Camacho finished, Vicente Castillo again spoke, "and he basically said the same violations that were on the list but in his own words and asked if [the employees] agreed to the strike and to please raise their hand" department by department. The vast majority voted in favor of striking, and employees immediately began picketing in front of the plant buildings, utilizing some picket signs, which the Union had collected from other strikes, and others, which were quickly constructed on the spot.[31] Miguel Canales also testified, stating that the rally began at approximately 11 a.m.; that several people including Camacho, Kingsley, and officials from other labor organizations spoke to the assembled employees; that Camacho told the employees that "the company was constantly violating the law and he was enumerating some of the violations that the company was doing. . . . that the supervisors were constantly watching when we were talking to the workers. And . . . that the company was hiring so many security guards to be videotaping us when we were talking to the people. And so Camacho was saying that to conduct an election . . . was going to be very difficult and the decision would have to be made by them." As Camacho spoke and mentioned the they could not tolerate so many violations of the law, according to Canales, the employees chanted, "'strike, strike.'" Thereupon, employees on the voluntary organizing committee spoke, saying they (the workers) would have to decide if they wanted to continue "with the same conditions," and Vicente Castillo said that, if the employees wanted to strike, they would take a vote. Then, all of those in favor of striking were asked to raise their hands, the "majority" raised their hands, and the strike began.[32]

Two employees, who engaged in the concerted work stoppage which began on June 18, testified on behalf of the General Counsel regarding the events of June 18. One, Encarnacion Garcia, testified that he heard Camacho speaking to the assembled employees on June 18 and that he discussed "some of the reasons" for the strike," among which were "because they had beat two members of the committee and they were often filming us with the video cameras or they were photographing us." During cross-examination, Garcia stated that, during the rally, the speakers mentioned the subjects, which are set forth in the second paragraph of Respondent's Exhibit 2, a leaflet which he distributed during

> The company has made it impossible for us to have a free and fair election because of the serious violations of our rights and the law which it has committed. The company has left us with no alternative but to leave work and strike, in order to protect our rights, and to stop the legal violations and abuses which the company had committed.

Other than the first unfair labor practice allegation, none of the remaining allegations are alleged as unfair labor practices in the amended consolidated complaint. Accordingly, as the General Counsel recognizes, a finding that the June 18 concerted work stoppage by Respondent's employees was an unfair labor practice strike depends upon whether Camacho ever mentioned Respondent's allegedly unlawful surveillance on June 4 as a reason for the strike. Finally, Maria Pantoja testified that she located G.C. Exh. 8 in the Union's file for Respondent, and I note that said document appears to be in pristine condition and is not creased or soiled in any manner.

[29] The vote was conducted by a showing of hands, which, Camacho stated, was unanimous.

[30] Pantoja identified the list as G.C. Exh. 8.

[30] Among the messages on the picket signs were "Cal Spas on Strike," "Respect our Rights," "Cal Spas Unfair," "Cal Spas Stole Our Rights." Also, according to a photograph, which appeared in the June 19 edition of the Inland Valley Daily Bulletin, some picket signs read: "We Want Union."

[32] Uncertain as to whether placards were ready on June 18, Canales believed that the picket signs for the strike were prepared "the day after they went on strike."

the strike. Among the subjects, set forth in the paragraph are the workers' lack of vacations, paid holidays, or medical insurance, and their wages and long hours of work. The other employee, Manuel Magana, a member of the volunteer employee organizing committee, testified that his lunchbreak was at 11 a.m. and that, on the above date, aware of the rally, he immediately went outside at the start of his lunch period. Magana estimated that approximately 300 employees were assembled in the area of the flatbed truck from which Camacho and other union representatives spoke. According to Magana, Camacho was speaking about "some incidents" in order "to motivate the people about the strike because the people didn't know. That's why he talked about the problem that . . . Alfredo Carabez had. He talked about the threats of the factory to move to another place. There was also harassment inside the factory. . . . He talked about all the problems because we had given reports of all these problems to him so he talked about all that." Magana further testified that, during his speech, Camacho mentioned "the security when we were on lunchtime. When he came to talk to us." Immediately after the above testimony, in response to a leading question, by counsel for the General Counsel, regarding what Camacho said about the type of surveillance undertaken by security guards, Magana replied, "Video cameras and also Polaroid cameras." After Camacho concluded, a strike vote was taken, and, according to Magana, "they all said yes. Then he said then we are on strike, that we declare a strike today."

Respondent's defense is essentially that what Camacho actually said to the assembled employees on June 18 differs markedly from the foregoing testimony and that contemporaneous and subsequent statements by union agents, the Union's strike literature, and statements of some of the striking employees themselves are corroborative of Respondent's witnesses' versions of Camacho's remarks, regarding the rationale for the strike. With regard to what occurred on June 18, Ed Rau, Respondent's safety director, testified that the rally began at approximately 11 a.m.; that, inasmuch as he remained inside the office building, he only heard "bits and pieces" of what was said and, then, only when the speakers' amplification system was aimed toward the offices; and that, nevertheless, he was able to hear such subjects as higher wages, vacation pay, sick pay, and holiday pay mentioned by speakers. Rau further testified that, at approximately 11:25 a.m., he observed "the organizing committee" step onto the flatbed truck, which was parked on Ninth Street, and ask the assembled employees whether or not they wanted to strike; "some" said yes, picket signs were distributed, and picketing began.[33] Victor Rodriguez, the motor installation department supervisor, testified that he went to lunch at 12 noon on June 18; that walked outside toward the lunch trucks; and that he was immediately confronted by employees, who were carrying picket signs and shouting for justice, assistance, rights, and for their coworkers to join their strike. Asked if he heard anything, Rodriguez recalled that Camacho was standing on the flatbed truck, holding a microphone, and shouting that listeners had "the right to stop working and that "they could gain benefits if they stopped their labor." Employee Antonio Albarran, who works for Respondent in the foam department and who did not participate in the strike, testified that he began his lunch break at 12 noon on the day the strike began; that, along with in excess of 50 other workers, he ate his food on the grass area in front of the woodchuck building; that he observed picketing during his lunchbreak; and that he observed an individual, apparently not Camacho, standing on the back of a truck and speaking into a microphone to those sitting and eating on the grass area. During direct examination, Albarran, who conceded he was not paying much attention, recalled the speaker asking them to support their coworkers and saying "for us not to worry about our rent because we are going to get the rent and the lunch and we're going to get money to pay bills . . . also about raises and the insurance and all that." During cross-examination, the witness gave a different version of what he heard—the speaker was "saying for us to come out and strike, that we could not be fired because we were protected by the government . . . that we had the right to strike . . . that we would be better off with the Union."

Also testifying, with regard to what Camacho said to the assembled employees prior to the strike vote, were Maria Martinez, Respondent's chief financial officer, and Jeremy Sullivan, the business reporter for a local newspaper, the Inland Valley Daily Bulletin. Martinez testified that, at approximately 11 a.m. while in her office, she became aware of a "commotion" outside on Ninth Street and the use of "bullhorns" by speakers; that, sometime between 11 and 11:30 a.m., she ventured outside "to see what was going on;" that she observed "a bunch of people" standing on the back of a flatbed truck and making speeches to employees, who were sitting in the grass area in front of the woodchuck building; that there was much cheering and commotion; and that the general tenor of the speeches was "about how they must have a walkout because they were demanding better wages, paid holidays, paid vacations, they didn't like the working conditions." Martinez specifically recalled the speech by Camacho, during which he "was telling the employees that they would get better wages, that they would get paid holidays, paid vacations, they were making a big issue out of better health insurance." After Camacho, employees Vicente Castillo and Lorenzo Paz addressed the crowd, and, while the latter spoke, "the employees would shout, the employees would raise their hands and there would be a lot of shouting . . . and cheering and yelling." Martinez was unable to recall whether an actual vote was ever taken but stated that, a few minutes before noon, she went back into the offices "because the crowd from 1462 was coming out at lunchtime and they were already yelling and screaming . . . and I thought I'd better get out of the way." From inside, she observed the start of the picketing "across the street and they all moved in mass all the way around and they started blocking the driveways" During cross-examination, Martinez conceded that she only heard Camacho speak for "probably 5 minutes" and that she may have gone outside as late as 11:45 a.m. and stayed outside no longer than 15 minutes. Further, notwithstanding having conceded that, with the "shouting" and "noise going on" outside, there were many comments which she did not hear, Martinez nevertheless denied that Camacho mentioned any of the "violations" set

[33] Robert Suminski corroborated the time that the picketing began. He testified that, at approximately 11:30 a.m., he stepped outside the offices in order to smoke a cigarette, and "all of a sudden everyone started marching . . . there was a large number of people . . . they had their signs and they were chanting very loud."

forth in General Counsel's Exhibit 8. Sullivan, who was assigned to report on the rally at Respondent's Pomona facility, testified that he arrived at the plant just as the demonstration was "forming up" and "I believe one shift had gone to lunch and I think it was shortly before noon"[34] and that "someone spoke before Mr. Camacho, then Mr. Camacho spoke, and it was a standard organizing speech." Asked if Camacho was reading from a document, Sullivan answered, "No, as I recall it was extemporaneous."

Also, contrary to the contentions that Camacho mentioned unlawful videotaping and surveillance as a reason for its employees to engage in their strike and that the alleged acts were a motivating factor for the strike, Respondent points to several contemporaneous and subsequent verbal and written statements by the Union, which refute the foregoing contentions. Thus, audible on Respondent's Exhibit 21, a videotape of the events outside the plant on June 18 at the start of the strike, is an unidentified individual shouting through a bullhorn, "We want the company to recognize us." On this point, Jeremy Sullivan, the newspaper reporter, testified that, while covering what occurred at the start of the strike, he was told by "some folks who represented themselves as being with the [Union]"[35] that the strike was a "recognitional strike" and that, as a result, he placed a telephone call to Region 21 of the Board in order to ascertain the meaning of the term. Further, on June 15, three days before the strike, the Union published a press release, proclaiming that Respondent had been declared "guilty" in a recent sexual harassment case, involving Maria Martinez, and stating that "Cal Spas workers are protesting sweatshop conditions, including wages close to the minimum wage, no paid vacations or holidays, health insurance they can't afford, exposure to toxic chemicals, and mistreatment and discrimination by company officials." No mention is made of unfair labor practices or acts of unlawful surveillance as a focus of the workers' protest. Then, 5 days after the start of the strike, on June 23, the Union published an appeal to the public for strike support. While likewise failing to mention allegedly unlawful videotaping and surveillance, the leaflet states:

> Our strike was caused by the company's violations of law and our rights, including reprisals against those of us organizing the union. The illegal acts went from intimidating workers in the plant to physical violence. The company organized a company union. An ex-worker was beaten in front of the plant. The company provoked a fight in the factory, and a member of our committee was arrested and taken from the company in handcuffs.

Thereafter, on July 1, 2 weeks after the start of the strike, the Union published a strike leaflet, which was distributed at Respondent's Pomona plant and at its retail stores and which, without mentioning unlawful videotaping or surveillance, states, "Despite minimum wages and bad working conditions, we, the Cal Spas workers, are not striking for a raise. We are simply asking for our rights as workers, a free election, and a halt to violence at the company." The document continues, "We have no vacations or paid holidays, and no affordable medical insurance. We are paid close to minimum. . . . We work with toxic chemicals without adequate protection. Sometimes we work 12 or 14 hour shifts, and if we refuse the company fires us." Then, on July 13, the Union issued a press release, regarding a Pomona City council meeting on July 15 for the purpose of settling the strike. The document accused the company of " massive violations of federal labor law, including illegal firings, the beating of a worker in front of the plant . . . and numerous threats over workers' union activity." There is no mention of alleged unlawful videotaping or surveillance. Finally, with regard to statements by Union agents as to the rationale for the strike, Camacho admitted that, in speaking before the Pomona City council prior to July 15, among other things, he said, "The Labor Board had scheduled a meeting so we could vote to ratify the union, and the company created violence so that the meeting would be canceled. . . . Through their action, our right to vote was taken away. . . . We went on strike because the company denied us that right to vote on a union. The company knew they could not win, that is why they used these disruptive tactics."

In addition to the comments of union agents regarding the actual rationale for the strike, Respondent points to written statements by striking employees themselves as establishing their motive for engaging in the strike—reasons other than Respondent's allegedly unlawful surveillance of their union activities. In this regard, the record establishes that most of Respondent's employees, who engaged in the instant work stoppage, filed claims for unemployment insurance with the State of California; that each filled out the required forms, among which is one entitled, "Employment Separation Statement"; and that one question, on the latter document, requires the applicant to explain, in detail, why he or she is no longer working for his or her last employer. Five employment separation statements (R. Exhs. 27 through 30 and 37), each signed by a striking employee, were received by me and entered into the record; on each document, the striking employee stated his or her reason for engaging in the strike against Respondent. Thus, in Respondent's Exhibit 27, employee Jose Castillo wrote "my motive . . . to go out on strike was to choose better salaries, better health insurance for myself and my family;" in Respondent's Exhibit 30, employee Refugio Martinez wrote "the owner ordered a member of the union to be beat up and the elections were postponed and that is why an immediate strike occurred;" and, in Respondent's Exhibit 37, employee Paulino Camarillo wrote "approximately 250 [Cal Spas employees] were on strike to protect our human rights, better health conditions and better salaries for the job we were doing." While none of the above employees identified his statement, employee Edgar Martinez identified his signature on Respondent's Exhibit 28, in which he wrote, as his reason for engaging in the strike, that "Cal Spas has been violating our rights, pay-

[34] Sullivan was uncertain as to whether the picketing had commenced prior to his arrival.

[35] While David Bacon denied being the media spokesperson for the Union during the strike and stated that no one individual was so designated, Humberto Camacho contradicted him, stating that all comments to the media were to come from one source—David Bacon, who was responsible for drafting all press releases and for speaking to the press. Camacho added that, in Bacon's absence, he or Pantoja could speak to the press.

Sullivan said that he did not speak to Camacho on June 18 and said Pantoja was not the union official to whom he spoke.

ing us very low salaries, no medical insurance and no paid holidays, etc.,"[36] and employee Bonifacio Hernandez identified his signature on Respondent's Exhibit 29, in which he stated, as his reason for striking, that "this company does not want to give insurance does not want to pay medical does not want to pay vacation or holidays and make us work shifts of 12 and 13 hours daily and that's why more than 200 of us . . . has [sic] gone on strike."[37]

The amended consolidated complaint alleges one instance of surveillance by Respondent as occurring sometime in June on Reservoir Street in the City of Pomona. The record reveals that Reservoir Street runs in a north-south direction perpendicular to Ninth Street and intersects the latter approximately a half mile from Respondent's plant. Mark Kester, a security guard, employed by AFI, testified that he was assigned to guard duty at Respondent's Pomona facility during the period of the 1993 strike; that his job assignment was to observe the activities of the strikers and report on them; and that he was assigned a video camera to record any unusual incidents. According to Kester, whose normal work shift was 10 p.m. until 6 a.m., one day "toward the end of the strike," he heard by "word of mouth" that the striking employees, with union agents in the lead, would march together down Reservoir Street in the afternoon, and, notwithstanding having received no instructions to do so, he decided to engage in surveillance of the employees' march during his off-duty hours. Accordingly, that afternoon, armed with his own video camera and wearing an AFI uniform, Kester stationed himself on Ninth Street and videotaped the marchers as they passed by him. Finally, with regard to this incident, Kester testified that he gave the videotape of the incident to Larry Kinsella, Respondent's general counsel, who accepted the tape and never returned it to Kester.

There is no dispute that the strike, by Respondent's employees, continued for a month, involved picketing at Respondent's Pomona and Ontario plants and at its retail stores, and ostensibly ended on July 19. Also, there is no dispute that, on the date, at approximately 12 or 12:30 p.m., Humberto Camacho gathered all the strikers in a group approximately a block from Respondent's Pomona plant,[38] and they marched, four abreast, along Ninth Street, through the visitor's parking lot, and up to the door of the 1462 building, Respondent's office building. At the door, the strikers were met by a group of management officials, who stood silently with their arms folded, and Camacho asked to speak to a company official; moments later, Robert Suminski came to the door. Camacho handed him a letter (G.C. Exh. 9)[39] and said "that I was coming to return all the strikers unconditional[ly] back to work and we wanted to know from the company if there was any objections." Suminski told Camacho that, if the employees, moved to the sidewalk, Respondent would immediately begin the process of interviewing each employee. The interviewing of the returning strikers, each of whom had a copy of General Counsel's Exhibit 9, took several hours. Each was handed a form letter, which stated, "[T]hat you have been replaced. You are not terminated but you have been replaced because you have left work without authorization and participated in a job action against the company" and told that his or her offer to return to work would be accepted and that he or she would be returned to work when a position became available. On July 19 and 20, Respondent's attorney, Hersh, confirmed the foregoing in letters to the Union's attorney and, without challenging the sincerity of the employees' unconditional offers to return, advised him that employees, who made an unconditional offer to return to work on July 19, would be placed on a preferential hiring list and "offered employment based upon openings in their individual departments."[40]

One facet of Respondent's defense to the unfair labor practice allegations herein is that, notwithstanding that Respondent accepted its striking employees' unconditional offers to return to work and did not challenge their sincerity, as picketing, by returning strikers, continued at its retail stores subsequent to July 19, the strike did not, in fact, end on that day. In this regard, Humberto Camacho testified that some of the former strikers did picket at Respondent's retail stores "for one day" subsequent to the conclusion of the strike; that "my understanding was that some employees carried signs from the trunks of their cars," and that, thereafter, he transmitted instructions to the former strikers "only to leaflet the stores, with the leaflets proclaiming a boycott of Respondent's products." Also, Maria Pantoja, who was in charge of the Union's activities at Respondent's retail stores during the strike, testified that, after July 19, "we were instructed to make new signs. Those, the Cal Spas On Strike, were not to be used after the strike was over." Corroborating Camacho, she added, however, that there was one incident, on July 22, "where some of the workers had already signs in their cars" and "so although we made new signs and we instructed the workers that we had to change, we were no longer on strike, I believe that . . . some of the On Strike signs showed up as an accident." Contrary to the Union's agents, Respondent contends that picketing continued after July 22 and with the same type of picket signs as used during the strike. Thus, Paul Hickman, the sales manager at Respondent's City of Industry, California retail store, and Kelly Ablard, the business manager at the store, corroborated each other that, on August 6 at approximately 2:30 p.m., five individuals,[41] each carrying a placard, began "walking back and forth" in front of the store and "handing out papers to our customers." The leaflets, one of which is in the record as Respondent's Exhibit 32, urge patrons not to purchase Respondent's products and state, "Cal Spas, 'The World's

[36] Asked why the employees decided to engage in a strike, Martinez testified, "First of all, we went on strike because supposedly we were going to have an election to be able to put in the Union. But they blocked it by hitting one of our co-workers."

[37] Hernandez asserted that what he wrote on the document were his "personal reasons" for striking. He recalled that Camacho spoke to the employees on June 18 from the back of a truck but could not recall Camacho reading from a paper.

[38] Earlier that morning, the strikers gathered at a local church and were told that the Union would make an unconditional offer, on their behalf, to return to work and that the strike would be over.

[39] The letter states, "The United Electrical, Radio and Machine Workers of America (UE) hereby makes an unconditional offer to return to work on behalf of all striking employees effective Monday, July 19, 1993" and attached was a list of all of the striking employees.

[40] In his July 19 letter to the Union's attorney, Respondent's attorney identified only two individuals, Cirilo Flores and Raymundo Soto, as being "not eligible for reinstatement."

[41] Police were called to the scene and ascertained the names of the five pickets—each was a former striker and an alleged discriminatee herein.

Largest and Best Spa Company' is on strike at the Pomona and Ontario factories. . . . Despite minimum wages and bad working conditions, we, the Cal Spas workers, are not striking for a raise. We are simply asking for our rights as workers, a free election, and a halt to violence at the company."

As the final facet of its defense, Respondent contends that, even if found to be unfair labor practice strikers, certain of the former strikers engaged in picket-line conduct, which went beyond the limits of protected concerted activity and constituted misconduct sufficient to permit Respondent to deny them reinstatement to their former positions, and that said misconduct included death threats, threats of physical violence, sexual harassment of nonstrikers, threats of retaliation, threats to call the Federal immigration authorities, threats of property damage, and blocking access to Respondent's Pomona plant. With regard to alleged death threats, Respondent's safety director, Ed Rau, testified that, 10 to 12 days after the commencement of the strike at approximately 9:30 in the morning, accompanied by Supervisors Victor Rodriguez and Rick Hopkins, he was returning to the office building from a production meeting in the warehouse building and, in doing so, passed by striking employees, who were picketing on Ninth Street in front of the office parking lot. According to Rau, as they approached the picketing employees, he heard Raymundo Soto, who is employed in the vacuum form department and who was standing, with a picket sign, at the edge of the entrance into the parking lot, say, in Spanish,[42] "if they give the prizes, the guy who gives the prizes is going to die, or will die."[43] Victor Rodriguez corroborated Rau, testifying that, a week after the start of the strike, accompanied by Rau and Hopkins, he was returning to his work area after attending a production meeting, and "the strikers were out walking . . . with their picket signs. And Raymundo Soto, in the presence of at least two other strikers, said in a loud voice that guy that gives us the prizes, I'm going to kill him. And Ed Rau and I, we stopped and we turned to look at him. I told him to repeat it and . . . . He said the same thing again." Soto, who denied threatening any supervisors during the strike, specifically denied uttering a threat to kill the person who distributed the prizes and conceded that, one day 2 or 3 weeks after the start of the strike while engaged in picketing at the Pomona plant, he did speak about killing something. According to Soto, he owned a few animals (goats, sheep, and calves), which he raised for slaughter and, while he was standing next to a fellow striker, Domingo Martinez, the latter asked why he didn't kill a calf, and Soto replied, "[P]ossibly I might pretty soon." He added that Rau and Rodriguez were watching the picketing at the time and might have overheard his brief conversation with Martinez.[44] Victor Rodriguez testified during surrebuttal and stated that Soto "never mentioned anything about killing cows or calves."[45]

There is record evidence of other types of verbal threats by striking employees. Thus, Supervisor Rodriguez testified that he arrived for work the morning after his and Rau's confrontation with Raymundo Soto and discovered the latter "waiting for me at the parking lot entrance." Soto moved in front of the supervisor's car "and he talked to me very angrily. He said it was going to cost me for what we did because . . . it was a prank, what he had said to us. And I answered him that sort of prank we didn't accept." Soto failed to deny his alleged threat to Rodriguez. Also, nonstriking employee, Francisca De-Fria, testified that, during the work stoppage, striking employees called her such names as "traitor" and "kiss ass" and threatened such things as "we're going to put the immigration department on you" and "we're going to burn cars up." However, while identifying Raymundo Soto as a striking employee, who directed "offensive" comments at her, other than recalling it was a "bunch" of strikers, she was unable to identify any particular striker, who uttered the threats to call immigration or to burn her car.

There is record evidence that striking employees attempted to block access to Respondent's Pomona plant on, at least, two occasions. Thus, Ed Rau testified that, on June 18, he observed "a pickup truck which tried to come into the wood shop facility and it was turned away. And the propane delivery truck came, tried to come into the 1462 building, and he was turned away. United Parcel also attempted to come in." Other than vaguely blaming a "continuous stream of people" for what occurred, Rau specified no striking employees as engaging in blocking access to the plant that day. Moreover, based upon Respondent's Exhibit 22, a videotape of picketline activities on June 21 and the testimony of Maria Martinez regarding the videotape, on the date, striking employees, including Vicente Castillo and Lorenzo Paz, both members of the employees' volunteer organizing committee, stood in front of cars, which were driven by nonstriking employees, as the latter employees attempted to drive into the employee parking lot, located next to the woodchuck building. Further, although unclear as to which striking employees were involved, the videotape also discloses that the presence of unidentified striking employees, congregated at an entrance to the plant, apparently dissuaded the driver of a garbage truck from attempting to enter the plant property.

Besides the foregoing, the record evidence establishes that striking employees directed sexually insulting and degrading comments and taunts at nonstriking employees and at management personnel. In this regard, Maria Martinez testified that she personally witnessed three striking employees, Raymundo Soto, Miguel Acosta, and Vicente Castillo, regularly treating female employees "in a very grotesque and rude manner."[46] Thus, she stated that Soto picked on two secretaries, calling them "whores" and "prostitutes" and asking "who were they sleeping with in order to keep their

[42] Rau is fluent in Spanish and understood what Soto said.

[43] Respondent had implemented a safety incentive program, and Rau regularly gave prizes to departments having the best safety records.

[44] Martinez, who admitted that he and Soto came to the hearing together, offered corroboration for Soto, testifying that he recalled a picketline conversation with his friend Soto during which he asked Soto about killing a calf, Soto said he wanted "to kill a calf," and Martinez asked if Soto was going to do so over the coming weekend. Martinez added that Rau and Rodriguez overheard the conversation and that he used the Spanish word for cow or steer while questioning Soto.

[45] In a letter, dated July 19, to the Union's attorney, the attorney for Respondent stated that Soto was not eligible for reinstatement.

[46] Martinez testified that she reported each incident, involving sexually insulting language used by pickets, to Respondent's attorney, Hersh, on the same day "as it happened. . . . We were reporting everything as it happened."

job,"[47] that Acosta, who worked in the equipment installation department, would approach women, who entered that department, and call them "more or less the same derogatory names;"[48] and that Castillo "used to direct a lot of derogatory names toward me. . . . He used to call me prostitute and street walker and how many men was I sleeping with to keep them inside so they wouldn't go on strike."[49] Soto denied making sexually insulting comments to Maria Martinez or anyone else during the strike. Finally, two nonstriking female employees, Patricia Pearson and Angelica Lara, each testified that unidentified strikers called her a whore during the strike, and Lara accused a striking employee of making suggestive comments about her breasts.

B. *Legal Analysis*

I initially consider those allegedly unlawful acts and conduct, which are attributed to Respondent in the amended consolidated complaint and which do not concern the June 18 strike, and, as to these, turn to the allegations that Respondent, through the acts and conduct of Supervisor Raymundo Olguin, violated Section 8(a)(1) of the Act by interrogating employees regarding their union membership and activities and by threatening employees with a bankruptcy closure or relocation of the business because of their support for the Union. In this regard, I credit the testimony of employee Juana Flores, who testified in a straightforward and convincing manner, over that of Olguin, who did not impress me as being a candid witness and who failed to specifically deny the conduct attributed to him, and find that, one day in May, Olguin called Flores to his work table and, after asking if she knew the "risks" of representation by a Union, threatened "that the company could be moved to another place or they could declare bankruptcy" and "we could end up . . . without work and without Union." Thereupon, Olguin asked Flores if she had already signed an authorization card for the Union. The Board has long held that an employer's comments regarding moving its business operations elsewhere or declaring bankruptcy, such as uttered by Olguin, when linked to its employees' support for a union and when not based upon objective facts, constitute unlawful threats. *American Wire Products*, 313 NLRB 989, 993 (1994); *Tricil Environmental Management*, 308 NLRB 669, 674 (1992); *Shenandoah Coal Co.*, 305 NLRB 1071, 1073 (1992). Therefore, I find that Olguin's above comments to Flores were threats violative of Section 8(a)(1) of the Act.

With regard to Olguin's questioning of Flores, regarding her execution of an authorization card for the Union, there is no record evidence that the latter was a known union adherent or had ever disclosed her views on the Union to Olguin or that Olguin "casually" put his question to Flores on the shop floor, and, in light of the former's accompanying unlawful threat, that, by supporting the Union, the employees risked causing Respondent to move its plant elsewhere or to declare bankruptcy, I find that Olguin's interrogation of Flores was coercive and violative of Section 8(a)(1) of the Act. *International Paper Co.*, 313 NLRB 280, 293 (1993); *Metalite Corp.*, supra; and *Advance Waste Systems*, 306 NLRB 1020 (1992). Likewise, as he appeared to be testifying in a candid and entirely straightforward manner, I credit Encarnacion Garcia's version of being interrogated by Olguin over the testimony of the latter, who only generally denied what had been attributed to him by Garcia, and find that, approximately a week before the strike, Olguin summoned his department's employees, one after the other, to his work table and that, when Garcia was called by Olguin, the latter "asked me if I had signed any paper for the Union." There is no record evidence that Garcia was a known union adherent, and it is clear that Olguin's question was not casually put to Garcia. Accordingly, as with Flores, I find that Olguin's interrogation of Garcia was coercive and violative of Section 8(a)(1) of the Act. *International Paper Co.*, supra; *Advance Waste Systems*, supra.

Turning to the amended consolidated complaint allegation that Respondent violated Section 8(a)(1) and (3) of the Act by issuing a disciplinary warning notice to employee Jose David Hernandez on June 11, as Hernandez failed to impress me as being a truthful witness and given the testimony of Lorena Orozco, who was a disinterested witness and who appeared to testify in a forthright manner, I am loathe to give much, if any, credence to Hernandez' testimony, and it is clear that whatever caused Respondent to issue him the warning notice did not involve Orozco. While Hernandez' supervisor, Alberto Olivo, also appeared to be a dissembler, particularly when changing his testimony as to his reason for deciding to give the warning notice to Hernandez, and not credible, based upon her forthright demeanor while testifying, Peggy Jiles did impress me as a witness worthy of belief, and, in these circumstances and given a stipulation of the parties, it is possible to discern certain truths concerning the warning notice. Initially, the warning notice, which, on its face, sets forth as Hernandez' transgression, "You have been observed reading and discussing literature and activities which appeared to be solicitations on behalf of the Union during periods in which you are being paid to work," presupposes the existence of a published no-solicitation policy or rule; however, as the parties stipulated, at the time of the warning notice, Respondent did not maintain any published policy or rule, specifically prohibiting solicitations, of any type, during working time, and Supervisor Olivo was unable to point to such a rule in Respondent's published "Standards of Conduct" for its employees. Next, it is clear that what precipitated the issuance of the warning notice to Hernandez solely involved his perceived solicitation of another employee on behalf of the Union. Thus, not only does the language of the warning notice itself mention soliciting for the

[47] During cross-examination, Martinez said that Soto would usually utter his comments in the mornings outside the office building; that he engaged in such conduct more in the early part of the strike than in its latter stage; and that "he was shouting . . . obscenities. . . . that [the female secretaries] were whores. That they were prostitutes. Something about, how much are they paying you. If you want to go to bed with one, I'll pay you more."

[48] Martinez stated that Acosta would normally repeat what Soto said.

[49] Martinez testified that she "heard [Castillo] shout his insults on . . . three, four" occasions; that "he seemed to be one of the leaders, he was always out there in front of the lines;" and that "it would have been at the very beginning of the strike" during the "first full week."

Martinez also mentioned a striking employee, identified only as Raymundo, who, on the third day of the strike, as she walked across Ninth Street and approached him near the entrance into the office parking lot, "grabbed himself . . . in the crotch" and yelled "that he needed a million dollars to come."

Union but also, when asked to relate what Olivo told her regarding the incident, which precipitated the warning notice, Jiles recalled him saying, "[T]hat during the working hours [Hernandez] was talking with another employee and that he had also with him literature and talking about what was in the literature," which "was not work related."

Contrary to counsel for Respondent, I do not believe that the dual motivation test of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), is the correct standard to use in determining whether the issuance of the June 11 warning notice was unlawful. Rather, the right of employees to communicate with each other concerning the desirability of organizing is one which is protected by Section 7 of the Act. *Mast Advertising & Publishing*, 304 NLRB 819, 827 (1991); *Foley-Wismer & Becker*, 263 NLRB 793, 797 (1982). "Further, it is a longstanding tenet of Board law that, when an employer has failed to adopt and publish a valid rule regulating union activity during work time, discipline for that reason will be upheld only when the employer demonstrates that it acted in response to an actual interference with or disruption of work." *Mast Advertising*, supra; *Trico Industries*, 283 NLRB 848, 852 (1987). Herein, of course, Respondent did not maintain a no-solicitation rule in effect at the time of its warning notice to Hernandez, has proffered no credible business justification for imposition of this unpublished rule on Hernandez, and presented no evidence that Hernandez' conduct caused a disruption in work. Rather, Supervisor Olivo's only expressed basis for the warning notice seems to have been the union activity in which Hernandez was engaged. Accordingly, I am compelled to find that, by issuing a written warning to Hernandez on June 11, 1993, Respondent unlawfully discriminated against him in violation of Section 8(a)(1) and (3) of the Act. *Mast Advertising*, supra; *Trico Industries*, supra; *Greensboro News Co.*, 272 NLRB 135 (1985).

The crux of the amended consolidated complaint allegations is, of course, that Respondent's employees' concerted work stoppage and strike from June 18 until July 19 was an unfair labor practice strike from its inception,[50] and, based upon the unfair labor practices allegations of the amended consolidated complaint, Respondent's only allegedly unlawful acts and conduct, which, as the General Counsel concedes, could have precipitated the strike, were various acts of personal and videotape surveillance, which occurred on May 28 and June 3 and 4. With regard to the acts of surveillance, which, the amended consolidated complaint alleges, were violative of Section 8(a)(1) of the Act, not only is the credibility of the witnesses a concern but also the significance of the several photographs, which arguably support the contentions of the General Counsel, must be considered. Thus, as justification for the allegations of paragraph 8(c) of the amended consolidated complaint, which concerns surveillance by Robert Suminski on May 28, counsel for the General Counsel relies upon the testimony of Humberto Camacho, as corroborated by David Bacon, and a photograph (G.C. Exh. 2). While, as discussed infra, I only reluctantly rely upon the testimony of either Camacho or Bacon, neither of whom, I believe, testified in an entirely candid or truthful manner herein, and, noting that General Counsel's Exhibit 2 is undated, I am diffident to finding, as fact, that the incident occurred, as alleged, on May 28. In contrast to the Union's agents, Robert Suminski impressed me as being an utterly duplicitous witness, and I believe that, while he conceded having chanced upon "some sort of a meeting," during which Camacho addressed a group of employees who were seated or standing in the grass area in front of the woodchuck building, noting his demeanor and posture (legs spread apart and hands in his pants pockets), as depicted in General Counsel's Exhibit 2, Suminski's contention, that he observed what was occurring, at this meeting, for no longer than 30 seconds, was absolutely incredible. Accordingly, I place no credence on his denial that his intent was to observe what transpired during the meeting, and, crediting the testimony of both Camacho and Bacon insofar as said testimony appears to have been corroborated by General Counsel's Exhibit 2,[51] I find that, sometime, prior to June, during the Union's organizing campaign at Respondent's Pomona plant, while Camacho, who was standing on the public sidewalk, overtly addressed a group of Respondent's employees, who were seated in the grass area in front of the woodchuck building, an area of Respondent's property in which employees normally congregate during their lunch period, Suminski, Respondent's vice president of special projects, stationed himself no more than 15 feet from Camacho, listening to what was said and observing what occurred, perhaps for the duration of the meeting.

[50] Concerted work stoppages, as herein involved, are properly characterized as being economic strikes, recognitional strikes, or unfair labor practice strikes. There is no dispute that, from its inception, a concerted work stoppage, even one which has more than one objective or motivation, will be considered to be an unfair labor practice strike if, at least, one of its causes or objectives is the existence or protest of the employer's unfair labor practices. *Kosher Plaza Supermarket*, 313 NLRB 74, 88 (1993); *Workroom for Designers*, 274 NLRB 840, 856 (1985); *C & E Stores*, 221 NLRB 1321, 1322 (1976). This is so even if the other objectives are economic in nature. *Central Management Co.*, 314 NLRB 763, 768 (1994). There is also no dispute that the major significance of the proper characterization of a strike involves the claimed right of the strikers to reinstatement. *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 703 (7th Cir. 1976). Thus, it is well settled that strikers, economic as well as unfair labor practice strikers, retain their status as employees pursuant to Sec. 2(3) of the Act. *Sunol Valley Golf Club*, 319 NLRB 357, 373 (1993). If the concerted work stoppage is characterized as an economically motivated strike, strikers, who unconditionally end their work stoppage and apply for reinstatement when their positions are filled by permanent replacement employees, are entitled to full reinstatement on the departure of the replacements or when substantially equivalent jobs, for which they are qualified, become available. *California Distribution Centers*, 308 NLRB 64 (1992); *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968). On the other hand, if the work stoppage is characterized as an unfair labor practice strike, the strikers, who unconditionally end their work stoppage, are entitled to immediate reinstatement at the conclusion of the strike even if the employer must discharge permanent replacements in order to do so unless legitimate and substantial business justification exists for not doing so. *Marchese Metal Industries*, 313 NLRB 1022, 1032 (1994); *Lucky 7 Limousine*, 312 NLRB 770 (1993); *Caterair International*, 309 NLRB 869, 880 (1992).

[51] There is no dispute, and I find, that the Union's organizers and Camacho had been openly conducting their organizing campaign outside the Pomona plant since April. I further find, as Camacho testified, that this incident was the first perceived instance of employer surveillance.

Counsel for Respondent argue that Suminski's open observation of Camacho's meeting with employees, unaccompanied by any other acts or conduct, was not unlawful, and I agree. Thus, the Board has long held that "an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance" and that "union representatives and employees who choose to engage in their union activities at an employer's premises should have no cause to complain that management observes them." *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986). These principles have been reiterated by the Board in *Roadway Package System*, 302 NLRB 961 (1991), and *Heartland of Lansing Nursing Home*, 307 NLRB 152 (1992). In the former case, the employer's plant manager visibly stationed himself in a guardhouse and, for 30 minutes, observed the handbilling of the company's employees as they entered and left the plant. Noting that the handbilling had been openly ongoing for 2-1/2 months, the Board reiterated, "It is well settled that where, as here, employees are conducting their activities openly on or near company premises, open observation of such activities . . . is not unlawful." *Roadway Package System*, supra at 961. A year later, in *Heartland of Lansing*, supra, the Board found that handbilling in front of the employer's facility was observed by supervisors from a resident's room and from passing cars. The Board adopted an administrative law judge's conclusion that surveillance of employees' activities, carried on in a public place, is not unlawful unless such involves "suspicious behavior or untoward conduct." Id. at 259. In contrast, the employers' conduct, in the cases, which are relied upon by counsel for the General Counsel, involves more than just "mere observation" by the employers involved. Thus, in *Impact Industries*, 285 NLRB 5 (1987), the Board found that the employer not only observed the employee handbilling over a substantial period of time but also expelled employee leafletters from its property for discriminatory reasons. Id. at fn. 2. Also, in *Carry Cos. of Illinois*, 311 NLRB 158 (1993), besides observing union business agents handbilling on two separate occasions, on the first occasion, the employer's representative questioned the handbillers as to what they were doing, remained within 2 or 3 feet of them during the handbilling, and eventually demanded that they leave, and, on the second occasion, the same employer representative, accompanied by an off-duty policeman, approached and warned the handbillers not to cross an imaginary yellow line, which separated the public property from that of the employer, and observed the handbilling along with the police officer. Id. at 1073. Herein, of course, Suminski did nothing more than merely observe Camacho's overt meeting with employees. Accordingly, such did not constitute unlawful surveillance within the meaning of Section 8(a)(1) of the Act and the undersigned shall recommend that paragraph 8(c) of the amended consolidated complaint be dismissed.

The remaining allegedly unlawful acts of surveillance, paragraphs 8(d) and 8(e) of the amended consolidated complaint, which assertedly bear upon the rationale for the June 18 strike, occurred on June 3 and 4. With regard to what supposedly occurred on June 3, I place no credence upon the testimony of the witnesses, proffered by the General Counsel, as to their description of the events of that day. Thus, counsel for the General Counsel relies upon the testimony of Camacho and that of Miguel Canales in support of the allegations contained in paragraph 8(d). However, Canales' testimonial demeanor was not that of an honest and straightforward witness, and, in this regard, I note that the June 3 billing records for the telephone in Alfredo Carabez' garage belie Canales' assertion that he placed a telephone call to Camacho at the Union's Compton, California office at 12 noon to inform the latter that he (Canales) had earlier observed security guards carrying video cameras at Respondent's Pomona plant[52] and that he was contradicted by all other witnesses as to the striking employees use of picket signs on June 18. Regarding Camacho, I believe that, in his testimony during counsel for the General Counsel's case-in-chief, he dissembled and was disingenuous as to his lack of knowledge that the Board had postponed investigation of the Union's representation petition based upon a blocking unfair labor practice charge, filed by Respondent, and as to what he may have said to Respondent's employees regarding it on June 18.[53] As with Canales, I have little confidence in Camacho's veracity on this and any other subject, and, unless corroborated by a more reliable witness or other evidence, I shall not credit any of their respective testimony. In the circumstances, I do not rely upon their versions of events on June 3. Inasmuch as there are no photographs of the events of June 3 and as counsel for the General Counsel relies solely upon the respective testimony of Camacho and Canales, none of which I credit, as support for the allegations of paragraph 8(d) of the amended consolidated complaint, I find such to be without merit and shall recommend dismissal of it.

Paragraph 8(e) of the amended consolidated complaint concerns what allegedly occurred on June 4, specifically that Respondent's security guards, at the Pomona plant, engaged in unlawful surveillance of the union agents' contacts with employees during their lunch period. In support, counsel for the General Counsel again relies upon the testimony of Camacho and Canales, and five photographs, which were taken by Bacon[54] and identified by Camacho and him as depicting the conduct of the AFI security guards that day. With regard to the credibility of each, I reiterate my belief that neither Camacho nor Canales appeared to be a straightforward witness, one upon which much, if any, reliance may be placed. Buttressing my view is their contradictory testimony as to whether, that morning, Camacho addressed a crowd of in excess of 200 employees, who were massed in the grass area in front of the wood shop, or, along with

[52] I note that several witnesses testified and Jt. Exh. 6 establishes that AFI did not purchase video cameras, on Respondent's behalf, until some time on June 3. In these circumstances, I do not believe that the AFI security guards, at Respondent's Pomona plant would have been carrying video cameras that morning.

[53] I note, of course, that, testifying during the General Counsel's rebuttal, which occurred approximately a month after his original testimony, Camacho contradicted himself and admitted having mentioned that Respondent had blocked the election during the June 18 strike rally.

[54] As with Camacho and Canales, Baacon's testimonial demeanor was not that of an entirely candid witness. Also, I note that, in describing what occurred on June 18, he and Camacho contradicted each other as to whether the latter purportedly read the contents of G.C. Exh. 8 to the assembled employees in English and then in Spanish or only in the latter language and that they contradicted each other regarding Bacon's status as the Union's media spokesperson.

Bacon and Canales, met with small groups of employees on the public sidewalks on both sides of Ninth Street. However, the aforementioned photographs (G.C. Exhs. 3–7), clearly depict AFI security guards carrying and, in some instances pointing, video cameras in the direction of Respondent's employees,[55] and, if Bacon and Camacho may be believed that the five photographs were, in fact, taken on June 4, such obviously is corroborative of the contentions of Camacho, Canales, and Bacon that Respondent's security guards did utilize video cameras to record Respondent's employees' contacts with them that morning.

On this point, while Respondent denied that the AFI security guards engaged in any videotaping of its employees' union activities prior to the start of the strike on June 18,[56] upon viewing the testimonial demeanor of the various witnesses, who testified in support of Respondent's contention, I find that each impressed me as being far less worthy of belief than any of the three union agents. Initially, noting that Robert Suminski admitted that AFI rented three camcorders and purchased six video tapes, on Respondent's behalf, on June 3.,[57] security guard, Albert Saldana, who maintained that General Counsel's Exhibits 3 and 5 were taken subsequent to the start of the strike, was utterly contradicted by Robert Murillo, who conceded that both photographs were taken prior to the strike, and by Suminski, who conceded that both photographs were taken in the early days of June. Moreover, given the expense of video cameras and the fact that Respondent's cameras were rented, security guard Saldana's assertion that General Counsel's Exhibit 5 merely depicts him practicing with one ("just feeling the camera out") is ludicrous. Also, Suminski and Murillo contradicted each other as to the type of vandalism done to Respondent's trucks in early June. Further, while agreeing that Respondent's employees' union activities were involved, Suminski and Larry Kinsella contradicted each other as to Respondent's reasons for renting the video cameras and as to why an increase in the AFI security guard force was necessary in early June, and Kinsella, Murillo, and Suminski, who conceded that the meeting on this subject occurred on the day on which Respondent received the video cameras, each incredibly testified that the video cameras were to be used only to record strike-related misconduct. Significantly, when it was explained to Suminski that Respondent obtained the video cameras at a time when a strike was not even contemplated, he changed his testimony, stating that the guards were to record "violent actions." Finally, notwithstanding what is depicted in the photographs and Saldana's testimony regarding his use of a video camera, Murillo maintained that he alone was authorized to videotape events in front of Respondent's facility.

Based on the foregoing, notwithstanding the troubling testimony of Camacho and Canales, given the clearly corroborative photographic evidence and what impressed me as the inherent dishonesty of Respondent's witnesses Suminski, Kinsella, Murillo, and Saldana, certain findings are possible with regard to the allegations of paragraph 8(e). At the outset, given the admissions of Suminski and Murillo, I find that, of the five above photographs, certainly General Counsel's Exhibits 3, 5, and 6 were taken on the day at issue—June 4. Further, I believe that, on the previous day, Respondent rented video cameras in order to record meetings between its employees and representatives of the Union in front of the Pomona plant and that, on June 4, Respondent provided security guard Saldana, who had been stationed on the grass area in front of the woodchuck building for no conceivable purpose other than to engage in overt surveillance of such meetings, with one of the newly rented video cameras to videotape Respondent's employees' aforementioned union activities.[58] Moreover, I find that, during Respondent's employees' lunch periods on June 4, Camacho, Bacon, and Canales met with small groups of employees and spoke to them about union organization and that, while employees spoke to the Union's representatives, in carrying out his instructions, Saldana pointed his video camera at them, thereby, videotaping or, at least, creating the impression that he was videotaping and surveilling their protected concerted activities.

The Board has long held that "absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate" (*Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1050 (1994)), and has recently extended this proscription to include the videotaping of protected concerted activities (*F. W. Woolworth Co.*, 310 NLRB 1197 (1993)). This is so, as such conduct "could reasonably tend to coerce [employees] not to take further concerted action" and "tends to create fear among employees of future reprisals." *F. W. Woolworth*, supra; *Waco, Inc.*, 273 NLRB 746, 747 (1984). In Respondent's defense, counsel rely upon the "seminal" Third Circuit Court of Appeals decision, *United States Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982), in which the court rejected the Board's per se approach for examining the coercive nature of photographing protected concerted activities and considered the surrounding circumstances for evidence of coercion; however, as pointed out in *F. W. Woolworth*, supra, the Board continues to cite its own decision, reported at 255 NLRB 1338 (1981), with approval, and I am bound by the decisions of the Board, particularly in this in-

[55] Security guard, Albert Saldana, identified himself in G.C. Exhs. 3 and 5, and Robert Murillo identified himself in G.C. Exh. 4.

[56] The Board has long held that an employer, which contracts with a security guard service for the stationing of guards at its plant, is liable for unfair labor practices, committed by the security guards notwithstanding that the guards may only have been hired to protect the employer's property and employees or that the employer did not have knowledge of or expressly authorize such conduct. *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61, 71 (1982); *Coors Container Co.*, 238 NLRB 1312, 1320 (1978). Accordingly, as I believe that the AFI security guards were acting within the scope of their authority, I find that Respondent was bound by the acts and conduct of the AFI security guards.

[57] While Rich Lucien, the AFI official who rented the video cameras, asserted that he did not visit Respondent's Pomona plant until June 7, Robert Murillo visited the plant on a regular basis and attended the meeting, regarding the use of the video cameras, which, Suminski admitted occurred on the day on which the cameras were rented.

[58] The record warrants the inference that Saldana did videotape the events of June 4. Thus, I find it rather incredible to believe that Respondent would provide a security guard with an expensive, and rented, video camera unless the camera was loaded with tape and the guard was instructed to use it. Further, I am not concerned that a tape the events of June 4 was not offered as evidence; that a videotape may not have existed at the time of the instant hearing, in December 1994, does not establish that a recording was never made.

stance. Moreover, unlike the situation in *United States Steel*, neither the Union nor Respondent's employees sought their own media coverage of the events of June 4 nor is there any record evidence that Respondent has engaged in such photographic surveillance in the past without reprisal. In addition, counsel rely on *Oakwood Hospital v. NLRB*, 983 F.2d 698 (6th Cir. 1993); however, such reliance is misplaced as, unlike the situation herein,[59] the cited decision involved a trespass by a union organizer. Moreover, I note that, as Respondent denied that the alleged misconduct occurred, a defense which I reject, it has offered no business justification for its conduct, and there is no record evidence of such. Accordingly, I conclude that Respondent's videotaping of its employees' contacts and meetings with Union representatives on June 4 was coercive and constituted unlawful surveillance, violative of Section 8(a)(1) of the Act. *Holyoke Visiting Nurses*, supra; and *F. W. Woolworth*, supra. Moreover, in agreement with counsel for the General Counsel, whether a video tape was actually in Saldana's video camera or whether he actually pressed down on the record button or merely pretended to do so, the "chilling effect" of such on Respondent's employees' Section 7 rights was the same, and, by creating the impression of surveillance, Saldana likewise engaged in conduct violative of Section 8(a)(1) of the Act. *Guille Steel Products*, 303 NLRB 537, 539 (1991); *Days Inn Management Co.*, 299 NLRB 735 (1990).[60]

In my view, whether, from its inception, Respondent's employees' concerted work stoppage should be categorized as being an unfair labor practice strike depends upon whether the fact of Respondent's videotape surveillance of its employees' meetings with the Union's representatives on June 4 was communicated to Respondent's employees by Humberto Camacho, at the June 18 strike rally, as a reason for them to vote in favor of a work stoppage. Put another way, "the information on which the employees acted when they voted to strike is what is crucial in determining if there is a causal connection between the Respondent's [unlawful videotape surveillance] and the determination to strike." *Reichhold Chemicals*, 288 NLRB 69, 73 (1988), remanded in part 906 F.2d 719 (D.C. Cir. 1990). In reaching my conclusions as to what Camacho said to the assembled employees, I note that Camacho, Bacon, and Canales testified regarding what occurred and corroborated each other on this issue. While I harbor doubts as to the veracity of each of these witnesses, Maria Pantoja, who impressed me as being an honest and forthright witness, one worthy of belief, corroborated Camacho's testimony. In addition, employee Encarnacion Garcia, whose demeanor, I have previously concluded, was that of a candid witness, corroborated the above witnesses with regard to whether Camacho spoke about Respondent's unlawful surveillance by use of video cameras. Moreover, and of utmost significance, besides being corroborated by Pantoja and Garcia,[61] the respective testimony of Camacho, Canales, and Bacon was essentially uncontroverted by any of the witnesses, who testified on behalf of Respondent. Thus, while Ed Rau, Victor Rodriguez, Maria Martinez, employee Antonio Albarran, and Jeremy Sullivan offered contrasting versions of what Camacho said to the assembled employees during the June 18 strike rally,[62] as each account was sufficiently deficient so as to render it of dubious value, I am unable to accord much weight to the testimony. Thus, Rau admitted that he was able to hear only "bits and pieces" of what was said; Rodriguez did not step outside of his department's building until 12 noon; Martinez believed that she went outside sometime between 11 and 11:30 a.m. but conceded that she may have done so as late as 11:45 a.m. and that she listened to what Camacho said for no more that 5 minutes; Albarran conceded that he failed to pay much attention; and, while testifying that he arrived as the events were "forming up" and that Camacho was speaking extemporaneously, Sullivan, the newspaper reporter, stated that, when he arrived at the site of the rally, the time was "shortly before noon" and that he could not recall whether picketing had commenced prior to his arrival. Accordingly, based upon the above-described corroborative and uncontroverted testimony of the witnesses, who testified on behalf of the General Counsel,[63] and the record as a whole, I find that, on June 18, during the rally in front of Respondent's Pomona plant, which began at approximately 11 a.m. and, at the conclusion of which, the assembled employees signified their desire to commence a strike against Respondent, Camacho read, to them, from General Counsel's Exhibit 8,[64] detailing, in Spanish, several alleged unfair labor practices, committed by Respondent, including that Respondent had videotaped and engaged in surveillance of meetings between its employees and representatives of the Union.[65] Therefore, as it is

[59] There is no record evidence that any trespassing, by the Union's agents, occurred on or before June 4.

[60] Likewise, I find that security guard Kester engaged in conduct, violative of Sec. 8(a)(1) of the Act, when he admittedly videotaped the striking employees' march on Reservoir Street. There is no dispute that such constituted a protected concerted activity, and, as Respondent offered no justification for Kester's conduct, it must be found coercive and violative of Sec. 8(a)(1) of the Act. *F. W. Woolworth Co.*, supra.

[61] I am not unmindful of the fact that neither Canales nor Garcia testified that, while listing the reasons underlying the necessity for Respondent's employees to vote in favor of a strike, Camacho read from G.C. Exh. 8.

[62] Rau and Martinez corroborated Camacho that the strike rally began at approximately 11 a.m. on June 18.

[63] Although not dispositive, I note that employee Vicente Medina credibly testified that, at one of the prestrike meetings with the volunteer employee organizing committee, Camacho said the decision to strike should be based on two factors, the blocking of the election and the videotaping of the employee meetings with representatives of the Union. At the very least, such is corroborative of the importance placed on the latter issue by Camacho, rendering it more likely than not that he did, in fact, raise the issue on June 18.

[64] I base this finding mainly upon the credible testimony of Maria Pantoja, who corroborated Camacho and Bacon that the former read from G.C. Exh. 8.

[65] Based on the credible testimony of Pantoja, I find that, as Camacho mentioned each of the perceived unfair labor practices, including Respondent's unlawful videotaping and surveillance of their contacts with the Union's representatives, the assembled employees, who, I believe had been previously informed by their fellow employees, who served on the volunteer organizing committee, that Camacho advocated they engage in a strike in order to protect themselves from Respondent's unfair labor practices, shouted "strike, strike, strike." Based on the record as a whole, I am also convinced that, besides listing the several perceived unfair labor practices, which were allegedly committed by Respondent, Camacho sought to further motivate the assembled employees to approve a strike by in-

Continued

clear that the strike was motivated, in part, by Respondent's videotaping of its employees' contacts with representatives of the Union on June 4, conduct which, I have concluded, was violative of Section 8(a)(1) of the Act, I further conclude, in agreement with the General Counsel, that Respondent's employees' concerted work stoppage and strike, which commenced on June 18, must be classified as, from its inception, an unfair labor practice strike.

In their posthearing brief, counsel for Respondent advance several arguments against a finding that, on June 18, Camacho mentioned Respondent's videotape surveillance as a justification for the employees' strike. Initially, counsel point to the Union's own literature, published immediately prior to and subsequent to the June 18 strike rally, to statements by Humberto Camacho, uttered subsequent to the start of the strike, and to subsequent statements of the strikers themselves as confirming Respondent's assertion. Indeed, as to the written and oral statements of the Union and Camacho, the record is replete with leaflets, which were published by the Union prior to and subsequent to the commencement of the strike and which enumerate causes and justifications for Respondent's employees' work stoppage—low wages, a lack of health insurance and paid vacations and holidays, formation of a company dominated union, beatings, arrests of union adherents, exposure to toxic chemicals, 12 to 14-hour workdays, illegal firings, and the employees desire for an election, and nowhere in the documents is there any reference to videotape surveillance by Respondent as a cause of the strike. Further, Jeremy Sullivan was told at the strike rally on June 18 that the work stoppage was for recognition, and, of course, Camacho himself admitted that, just a few days before the end of the work stoppage, he appeared before the Pomona City council and, rather than referring to the surveillance, told the members of the council that "we went on strike because the company denied us that right to vote on a union." However, despite the foregoing, what is of controlling significance herein is what Camacho said to Respondent's assembled employees on June 18 as the justification or justifications for their collective decision to engage in a work stoppage against Respondent and not what union officials may have written or said subsequently.[66] Furthermore, while the Union's failure to mention Respondent's unlawful videotaping and surveillance in its pre and post-strike publications is arguably revealing as to the comparative unimportance of the unfair labor practice as an underlying cause of and justification for Respondent's employees' concerted work stoppage and while Camacho's above described admitted statement to the Pomona City council not only established the Union's cover up of the issue as a reason for the strike but also served to underscore its importance, I note that, in determining whether a strike is, in part, an unfair labor practice strike, the Board does not calculate the degree of importance, or weight, to be attached to the extant unfair labor practices. Thus, the Board considers only whether the strike "was at least in part the direct result of the Respondent's [unfair labor practices]" and whether "the employer's unlawful conduct has played a part in the decision to strike." *Central Management Co*, supra at 768; *C & E Stores*, supra at 1322. Likewise, the court in *Colonial Haven Nursing Home*, supra at 704, recognized that the mere existence of "causal connection" between the unfair labor practices and the strike is sufficient to justify a finding that a strike is "bottomed" in part upon unfair labor practices. Herein, of course, I have concluded that, Respondent's employees not only signified their desire to engage in a strike after Camacho detailed Respondent's perceived unfair labor practices, including its unlawful videotaping and surveillance, but also did so while he spoke.

In the same vein, counsel for Respondent point to written statements of the strikers themselves, set forth on unemployment insurance claims forms filed with the State of California, as establishing their respective motives for striking—reasons other than Respondent's unlawful surveillance of their protected concerted activities[67]—and contradicting the testimony of the witnesses, who testified on behalf of the General Counsel regarding the events of June 18. However, as I emphasized above, the crucial point is what Camacho said to the massed employees prior to their strike vote on June 18, and I have credited the corroborative testimony of the witnesses, who testified, on behalf of the General Counsel, that Camacho specified Respondent's videotape surveillance as an unfair labor practice justifying a strike. Furthermore, as each employee may have had his or her own personal reasons for participating in the strike and as, in my view, the pertinent inquiry is as set forth above, reliance upon the subjective reasons of the employees for engaging in the strike against Respondent would be of scant relevance herein. Thus, reliance upon court decisions, such as *NLRB v. Vanguard Tours*, 981 F.2d 62 (2d Cir. 1992), wherein, with no objective evidence establishing that the employer's unfair labor practice was a substantial contributing factor to its employees' strike, the court was forced to rely upon subjective evidence, such as each employee's motive for engaging in the strike, is misplaced. Accordingly, I find the contentions of counsel for Respondent, in this regard, to be without merit.

Finally, counsel for Respondent contend that one incident of unlawful videotape surveillance is not a sufficient basis for an unfair labor practice strike and cite to language in *Colonial Haven Nursing Home*, supra at 705, wherein the court

forming them that Respondent had blocked the anticipated representation election by filing its own unfair labor practice charge against the Union. Finally, I believe that, after Camacho concluded his remarks, employees, who were members of the volunteer organizing committee, spoke, mentioning possible goals of a strike, including recognition, by Respondent, of the Union as the employees' bargaining representative and attaining economic benefits such as health insurance, paid vacations and holidays, higher wages, and shorter hours.

[66] In this regard, I have concluded that Camacho did, in fact, mention Respondent's videotape surveillance of its employees' meetings with union agents as an unfair labor practice and as a stated justification for the strike and that the assembled employees signified their approval of such as a justification for striking. While the Union's above-described subsequent statements and Camacho's subsequent comments may cast doubt upon the testimony of Camacho and other union agents, who testified regarding what Camacho said to the assembled employees on June 18, contrary to counsels' contention in Respondent's posthearing brief, I note that an employee, Encarnacion Garcia, who, I believe, testified honestly, corroborated the above-described testimony.

[67] These include better salaries, health insurance, beatings, an immediate election, better health conditions, protection of human rights, and the lack of paid vacations and holidays.

ventured that photographic surveillance was "not the type reasonably to be expected to cause a union or employees to seek the self-help use of a strike for correction." Contrary to counsel, I have found no Board decision, nor has one been cited, in which the Board has undertaken an analysis of the coercive nature of the respondent's unfair labor practice in order to decide whether a concerted work stoppage could be classified as an unfair labor strike if, in fact, motivated by the conduct. I have concluded that the strike was, in fact, based, in part, upon Respondent's unlawful videotape surveillance and note that Respondent's June 4 videotape surveillance occurred during its employees' lunch period when literally hundreds of workers may have witnessed security guard Saldana's manipulation of a video camera, including pointing it at employees while they spoke to or listened to representatives of the Union. I have previously concluded that Saldana's conduct, which, of course, is attributable to Respondent, had a clear chilling effect upon its employees' Section 7 rights (*F. W. Woolworth*, supra), and I can not accept counsel's contention that the conduct was not sufficiently serious, coercive, and destructive of Respondent's employees' Section 7 rights so as to justify an unfair labor practice strike.

I have concluded that Respondent's employees' concerted work stoppage and strike was, in part, the direct result of Respondent's unlawful videotaping and surveillance of its employees' protected concerted activities on June 4 and that, therefore, the concerted work stoppage was, from its inception, an unfair labor practice strike. Accordingly, as, on July 19, each striking employee offered to unconditionally return to work, Respondent was obligated to offer to each returning striker immediate reinstatement to his or her former position or, if such was not available, to a substantially equivalent position. *Marchese Metal Industries*, supra; *Workroom for Designers*, 274 NLRB 840, 856 (1985). It follows that by failing and refusing to honor its returning strikers' offers to return to work and by treating each as having been permanently replaced, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act. *Refuse Compactor Service*, 311 NLRB 12, 20 (1993). In arguing that it did not unlawfully fail and refuse to reinstate the returning strikers, counsel for Respondent contend that, inasmuch as employees, who had unconditionally offered to return to work on July 19, continued to picket, at its retail stores, with placards and handbills, which stated that they were on strike, subsequent to July 19, their conduct was inconsistent with their aforementioned unconditional offer to return to work, rendering said offers invalid. In this regard, Maria Pantoja conceded that, on July 22, employees, who had participated in the strike, picketed at one of Respondent's retail outlets with "Cal Spas On Strike" picket signs, and I credit the respective uncontroverted testimony of Paul Hickman and Kelly Ablard that, on August 6 at Respondent's City of Industry, California retail store, five employees, who had participated in the strike, picketed and distributed handbills, which stated that its employees were on strike against Respondent. However, contrary to counsel, while an unconditional offer to return to work after a strike and a continuation of the said strike after the offer are inconsistent with each other, the Board has long held that mere picketing does not mean that an employer's employees refuse to work. *Dold Foods*, 289 NLRB 1323, 1333 (1988). Moreover, in this instance, Respondent refused to reinstate any of the returning strikers, choosing to consider each as being a permanently replaced economic striker. As the Board stated in *Hawaii Meat Co.*, 139 NLRB 966, 971 (1962):

> An unconditional request for reinstatement of strikers must carry with it . . . an undertaking to abandon the strike if the request is granted. It does not require employees to forfeit their right to continue to strike if the request is denied. All that is required is that the . . . employees unconditionally offer to return to work in the status they occupied before the strike began.

Herein, Respondent's employees unconditionally offered to return to work, and, while refusing to reinstate the returning strikers, Respondent accepted the offers and never challenged their sincerity. In these circumstances, the fact that, on at least two occasions, returning strikers picketed and handbilled at Respondent's retail stores is not inconsistent with their unconditional offers to return, and, therefore, I find that said offers were bona fide and valid. *W. C. McQuaide, Inc.*, 220 NLRB 593, 609 (1975).

Finally, Respondent contends that certain of the returning strikers were not entitled to reinstatement as they engaged in strike-related misconduct including death threats, threats of physical violence, sexual harassment of nonstrikers, threats of retaliation, threats of property damage, threats to call the Federal immigration authorities, and blocking access to its Pomona plant. At the outset, in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), the Board adopted the following standard for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate: "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." Continuing, the Board stated that striking employees have "no right" to threaten employees who have chosen to work during a strike or to block access to the employer's premises, and may engage in nothing more than "peaceful patrolling" of the struck premises. Id. at 1067. With regard to the alleged death threats, which were attributed to Raymundo Soto, Ed Rau, and Victor Rodriguez each impressed me as being an honest and straightforward witness. In contrast, neither Soto nor Domingo Martinez impressed me as having any regard for the truth, and I found their version of what occurred—that Soto was speaking about killing a calf—utterly incredible. Accordingly, relying upon the credible and corroborative testimony of Rau and Rodriguez, I find that, one morning approximately 10 days after the commencement of the strike, while Rau and Rodriguez passed by Soto, who was picketing in front of the office parking lot, in the presence of other striking employees, Soto threatened that, if Respondent continued to award safety prizes, "the guy who gives the prizes is going to die, or will die" and that, as Rau is Respondent's safety director and in charge of Respondent's safety incentive program, the threat was obviously directed toward him. Clearly, death threats, as uttered by Soto, are the type of strike-related misconduct, which would warrant a denial of reinstatement to a striking employee. *Gloversville Embossing Corp.*, 297 NLRB 182, 194 (1989); *Clear Pine Mouldings*, supra. Further, the Board has made clear that, just as directed toward nonstrik-

ing employees, such strike-related misconduct, as herein involved, directed toward managers, also constitutes grounds for denying reinstatement. *Virginia Mfg. Co.*, 310 NLRB 1261, 1272 (1993); *General Chemical Corp.*, 290 NLRB 76, 82 (1988). In addition to the foregoing death threat, crediting the uncontroverted and credible testimony of Supervisor Rodriguez, I find that, the next morning, Soto accosted Rodriguez in the parking lot and angrily warned that it would "cost" him for reporting the death threat against Rau. Clearly, threats of retaliation against supervisors, as uttered by Soto, are coercive and likewise constitute strike-related misconduct and warrant a denial of reinstatement. Accordingly, I find that, inasmuch as he threatened to kill Ed Rau and threatened to retaliate against Rodriguez for reporting the threat to Rau, Respondent lawfully denied reinstatement to Raymundo Soto. *Gloversville Embossing*, supra.[68]

Continuing, counsel for Respondent asserts that, inasmuch as a videotape, recorded on June 21, shows striking employees, Vicente Castillo and Lorenzo Paz standing in front of cars, driven by nonstriking employees, and impeding their access to the employees' parking lot, Respondent was justified in denying immediate reinstatement to the striking employees.[69] While in *Clear Pine Mouldings*, supra, the Board did state that blocking access to the employer's premises constitutes misconduct sufficient to justify a denial of reinstatement at the conclusion of a strike, the subsequent Board decisions, relied upon by counsel for Respondent for support, establish that one isolated incident during a strike, involving identifiable individuals, is hardly sufficient to constitute grounds for denying reinstatement. Thus, in *Tube Craft*, 287 NLRB 491 (1987), the record evidence established that the blocking of access occurred over a span of 4 days, that the incidents lasted up to over an hour, and that each incident involved four or five identifiable individuals. Likewise, in *M. P. C. Plating*, 295 NLRB 583 (1989), the blocking of access to the employer's facility occurred on a daily basis over the first few weeks of the strike and involved identifiable pickets, in sizable numbers, purposely impeding access to the plant by numerous nonstrikers and supervisors alike and engaging in such egregious misconduct as linking arms to form an impenetrable phalanx. In both cases, the blocking of access constituted "a pattern of conduct evidencing a strategy of refusing to limit the picketing to peaceful appeals for support of the strike." *Tube Craft*, supra at 493. Such, of course, is not present in the isolated incident of blocking access, involving Castillo and Paz, and I do not believe that Respondent may be justified in denying reinstatement to either employee.

Finally, these regards, I consider the record evidence, concerning alleged sexually insulting and degrading comments and taunts directed at nonstriking female employees, and, this regard, I credit the frank and reliable testimony of Maria Martinez. Thus, I find that striking employee, Raymundo Soto, whom, I previously concluded, Respondent was justified in refusing to reinstate, regularly referred to two office secretaries as being whores and prostitutes and accused them of sleeping with managers in order to retain their jobs; that striking employee, Miguel Acosta, regularly taunted nonstriking female workers in the equipment installation department, calling them whores and prostitutes; and that striking employee, Vicente Castillo, on three or four occasions, called Martinez a prostitute and a street walker and asked with which employees she was sleeping in order to dissuade them from striking.[70] There is no question that the malicious and vulgar use of sexually explicit slurs and ridicule has a severe emotional impact upon individuals' sensitivities and, notwithstanding that the foregoing conduct occurred within the context of the emotionally charged atmosphere of a strike, the invective of Soto, Castillo, and Acosta was obviously coercive of employees' Section 7 rights. *Romal Iron Works Corp.*, 285 NLRB 1178, 1182 (1987); *Bonanza Sirloin Pit*, 275 NLRB 310 (1985).[71] However, Martinez testified that, immediately after each of the above-described incidents occurred, she informed Respondent's attorney, Hersh, regarding what occurred, and, in these circumstances, one can assume that counsel was well aware of the evidence that Soto, Acosta, and Castillo had engaged in the above strike-related misconduct. Yet, in his July 19 letter to the Union's lawyer, Respondent's attorney, Hersh, specified only Soto as being ineligible for reinstatement and, although he did not so state, obviously creating the inference that returning strikers Castillo and Acosta would be included on the preferential hiring list and eligible for reinstatement at some point. Further, Respondent offered no explanation for its disparate treatment of Soto, Castillo, and Acosta. In these circumstances, counsel for the General Counsel argues that foregoing represents Respondent's condonation of the misconduct of Acosta and of Castillo. As stated by the Board, in *White Oak Coal Co.*, 295 NLRB 567, 570 (1989), in deciding whether an employer has condoned certain conduct, it "does not look for any 'magic words,' suggesting forgiveness." Rather, the Board examines "whether all the circumstances establish clearly and convincingly that the employer has agreed to 'wipe the slate clean' in regard to any misconduct." Moreover, condonation should not be "lightly inferred." Heeding the Board's admonition, based upon the record as a whole, I agree with counsel for the General Counsel that, as Respondent seems to have been well aware of the conduct of Acosta and Castillo, its attorney's failure to specify the two returning strikers as ineligible for reinstatement is compelling and, rather than being an excusable oversight, suggests that, for some reason, Respondent made a reasoned decision not to deny reinstatement to Acosta and Castillo thereby effectively condoning the misconduct of each. Such a conclusion appears to be fully warranted, and I do not believe that Respondent is now justified in asserting

[68] There is also record evidence that unidentified strikers threatened to burn the cars of nonstriking employees and to call the immigration authorities. While such threats undoubtedly would be coercive of the nonstrikers' Sec. 7 rights, inasmuch as the responsible individuals were unidentified, no findings are possible.

[69] There is also record evidence that, on the first day of the strike, a continuous stream of marching employees blocked access to a pickup truck and a propane delivery truck and that, on June 21, pickets congregated in front of a plant entrance and dissuaded the driver of a garbage truck from entering the plant property. However, as the individuals involved in both incidents were unidentified, I shall make no findings as to either event.

[70] I make no findings as to the employee, identified only as Raymundo, who, in Martinez' presence, obscenely grabbed his crotch and yelled that he needed a million dollars "to come."

[71] Contrary to counsel for Respondent, I find no record evidence to justify a conclusion that the Union ratified such conduct.

that either Castillo or Acosta should be denied reinstatement based upon the acts and conduct attributed to each by Martinez. *Virginia Mfg. Co.*, supra at 310 fn. 2.

CONCLUSIONS OF LAW

1. Respondent Cal Spas and Respondent GB constitute a single-integrated enterprise (Respondent), and a single employer within the meaning of the Act, and Respondent Cal Spas and Respondent GB each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent threatened its employees that it would move its business operations elsewhere or declare bankruptcy in order to discourage them from engaging activities in support of the Union, thereby engaging in conduct violative of Section 8(a)(1) of the Act.

4. Respondent coercively interrogated its employees regarding their union sympathies and activities, thereby engaging in conduct violative of Section 8(a)(1) of the Act.

5. Respondent engaged in surveillance of its employees' union activities by videotaping said activities, including their meetings with union agents and other protected concerted acts, or conveyed to its employees the impression that it was engaging in surveillance of their union activities by videotaping their meetings with Union agents, thereby engaging in conduct violative of Section 8(a)(1) of the Act.

6. Notwithstanding the absence of any rule or regulation prohibiting such conduct during worktime, Respondent issued a warning notice to employee Jose David Hernandez because he solicited another employee to support the Union, thereby engaging in conduct violative of Section 8(a)(1) and (3) of the Act.

7. The strike, in which Respondent's employees engaged from June 18 through July 19, 1993, was, in whole or in part, motivated by Respondent's unfair labor practices and, therefore, was, from its inception, an unfair labor practice strike.

8. By not offering immediate reinstatement to its employees, who, on July 19, unconditionally offered to end their strike and return to work, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

9. Respondent's above described are unfair labor practices, affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having concluded that Respondent engaged in serious unfair labor practices, violative of Section 8(a)(1) and (3) of the Act, in order to remedy them, I shall recommend that Respondent be ordered to cease and desist therefrom and to engage in certain affirmative action designed to effectuate the policies of the Act. Thus, as I have concluded that the June 18 through July 19 concerted work stoppage was an unfair labor practice strike and as I have concluded that, notwithstanding the strikers' unconditional offer to return to work on July 19, Respondent unlawfully failed and refused to offer immediate reinstatement to the returning strikers, treating them as economic strikers and offering to reemploy them as positions became available, I shall recommend that Respondent be ordered to offer immediate reinstatement to the strikers, identified in the amended consolidated complaint, to their former or substantially equivalent positions, discharging, if necessary, any replacements hired after June 18, 1993, and to make each returning striker whole for wages and other benefits lost as a result of its unlawful conduct, with interest as computed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, inasmuch as I have concluded that the warning notice, dated June 11, 1993, which was issued to Jose David Hernandez, was unlawful, I shall recommend that Respondent remove the warning notice from his personnel file, remove, from its records, any reference to said warning notice, and not use it as the basis for any personnel action against Hernandez. Finally, I shall recommend that Respondent post a notice, delineating the foregoing.

[Recommended Order omitted from publication.]